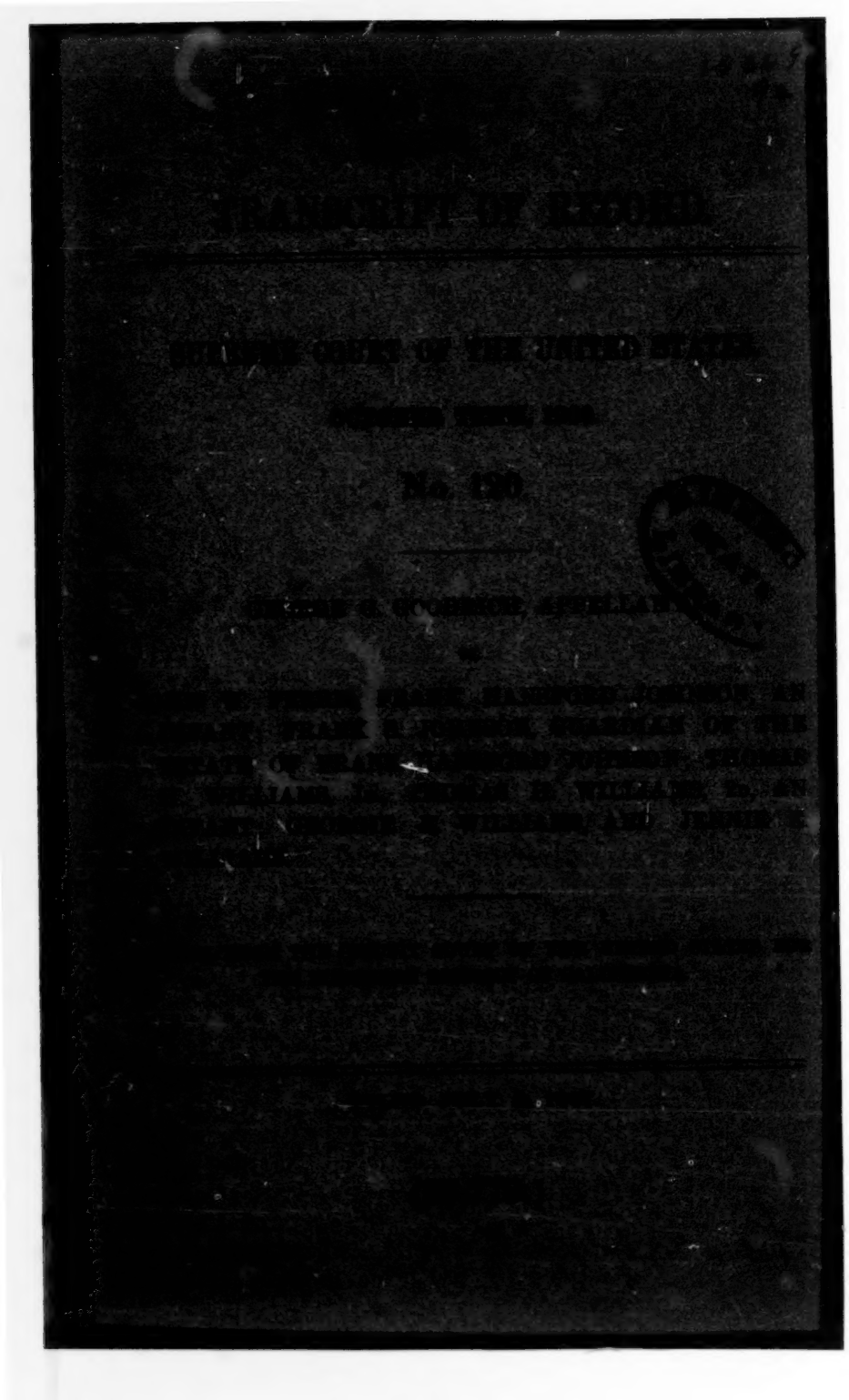

(20,779.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 120.

GEORGE G. GOODRICH, APPELLANT,

vs.

JOHN W. FERRIS, FRANK HANSFORD JOHNSON, AN INFANT; FRANK S. JOHNSON, GUARDIAN OF THE ESTATE OF FRANK HANSFORD JOHNSON; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, 2D, AN INFANT; GEORGIE E. WILLIAMS, AND JENNIE E. WILLIAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Specification of interrogatories which each defendant is required to answer	37	20
Exhibit A—Last will and testament of Thomas H. Williams	38	20
B—Codicil to will of Thomas H. Williams	48	25
C—Decree of final distribution and order settling final account, January 5, 1897	49	26
Subpœna	100	52
Marshal's return	101	53
Petition for appointment of guardian *ad litem*	104	54
Order appointing guardian *ad litem*	107	55
Demurrer of John W. Ferris *et al*	109	56
Demurrer of Frank S. Johnson	113	59
Demurrer of Frank Hansford Johnson	118	62

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1908.

	Original.	Print.
Order allowing complainant to file an amendment to bill of complaint	122	64
Amendment to bill of complaint	123	65
Order sustaining demurrers and directing the dismissal of bill of complaint and amendments to bill	132	70
Enrollment	133	71
Decree	135	72
Certificate to enrollment	136	72
Opinion	137	73
Petition for appeal	170	90
Order allowing appeal	171	91
Assignment of errors	172	91
Bond on appeal	177	94
Clerk's certificate to transcript	179	95
Citation	180	96
Acceptance of service of citation	181	96

1 In the Circuit Court of the United States, Northern District of California.

Bill of Complaint.

GEORGE G. GOODRICH
vs.
JOHN W. FERRIS ET ALS.

2 In the Circuit Court of the United States for the Northern District of California, in the 9th Judicial Circuit. In Equity.

To the Judges of the Circuit Court of the United States for the Northern District of California, in the 9th Judicial Circuit:

George G. Goodrich of New York City, and a citizen of the State of New York, brings this, his bill against John W. Ferris, individually and as trustee, of San Francisco, a citizen of the State of California; Frank Hansford Johnson, an infant; Frank S. Johnson as guardian of the estate of said Frank Hansford Johnson, both of San Rafael, in the County of Marin, State of California, and citizens of the State of California; Thomas H. Williams, Jr., of San Francisco and a citizen of the State of California, Thomas H. Williams, 2d, an infant under the age of 14 years, who resides with his father, said Thomas H. Williams, Jr., at the City and County of San Francisco, State of California; Georgie E. Williams, a citizen of California, Jennie E. Williams, a citizen of California, heirs at law of George E. Williams, deceased; and thereupon your orator complains and says: That your orator is a resident of the City of New York and a citizen of the state of New York; and that the said John W. Ferris of San Francisco, Frank Hansford Johnson, an infant, Frank S. Johnson as guardian of the estate of said Frank Hansford Johnson, Thomas H. Williams, Jr., Thomas H. Williams 2d, an infant, Georgie E. Williams, and Jennie R. Williams are all residents and citi-
3 zens of the State of California; that the said Frank Hansford Johnson is an infant over the age of 14 years, and that the said Thomas H. Williams 2d, is an infant under the age of 14 years.

And your orator further shows unto your Honors, that on the 28th day of February, 1886, one Thomas H. Williams, a resident of the City and County of San Francisco, and a citizen of the State of California, departed this life at the said City of San Francisco, seized and possessed of a large amount of real property, situated in the Counties of San Joaquin, Sacramento, Solano, Contra Costa, Yolo and in the City and County of San Francisco, in said State of California; more particularly hereinafter described and set out in the decree of distribution hereunto annexed, marked "C" and made a part of this bill, and that, at the time of his death, he left no wife him

surviving, and that his only heirs at law were his children and lawful issue, namely:

Sherrod Williams, a son, of full age; said Thomas H. Williams, Jr., a son of full age; Mary Bryant Williams, intermarried with said Frank S. Johnson, a daughter of full age; Percy Williams, a son, of full age; and Bryant Williams, a son, over twenty years of age, all born in lawful wedlock, and whose mother was dead; that upon the death of said Thomas H. Williams, that part of his real estate situated in the State of California, of which he died intestate, as hereinafter set forth, passed to and vested one-fifth in each of said children.

And your orator further shows unto your Honors, that the said Sherrod Williams departed this life on or about the 2nd day of August, 1888, leaving no wife or lawful issue, him surviving, and leaving his said sister Mary B. and his said brother, the de-
4 fendant, Thomas H. Jr., and his said brother Bryant, and his said brother Percy him surviving, who, under the laws of California and particularly section 1386 of the Civil Code thereof, became and were his only heirs at law, and his real estate situated in the State of California, passed to, and vested, one fourth thereof in said Mary B. Goodrich, the wife of your orator, and one-fourth thereof in said Bryant Williams, and one-fourth thereof in said Thomas H. Williams, Jr., and one-fourth thereof in said Percy Williams.

And your orator further shows unto your Honors, that the said Percy Williams, was, on the 1st day of August, 1888, lawfully married to one Bessie L. Trahern Williams, at the City of Stockton, and that there was issue of said marriage, one child, born November 12th, 1889, who departed this life on February 16th, 1890, and that said Percy Williams died at Fresno, in the State of California, on or about October 3rd, 1890, leaving him surviving his widow, the said Bessie L. Trahern Williams, and his sister Mary B. Goodrich, the wife of your orator, and his said brothers, said Bryant Williams and said Thomas H. Williams, Jr., who, under the laws of California, and particularly under section 1386 of the Civil Code thereof, became and were his only heirs at law, and his real estate situated in the State of California, passed to and vested, one-half thereof in said Bessie L. T. Williams, and one-sixth thereof in said Mary B., the wife of your orator, one-sixth thereof in said Bryant Williams and one-sixth thereof in said Thomas H. Williams, Jr.

And your orator further shows unto your Honors, that the said Bryant Williams, then of full age, departed this life at the said City of San Francisco on or about the 2nd day of May, 1893, un-
5 married, and without lawful issue, leaving him surviving his sister, the said Mary B. Goodrich, the wife of your orator, and his brother, the defendant, Thomas H. Williams, Jr., who, under the laws of California, and particularly section 1386 of the Civil Code thereof, became and were his only heirs at law, and his real estate situated in the State of California, passed to and vested, one-half thereof in said Mary B. Goodrich and one-half thereof in said Thomas H. Williams, Jr.

And your orator further shows unto your Honors that prior to

the death of said Thomas H. Williams, said Mary Bryant Williams, afterwards the wife of your orator, intermarried with the defendant, Frank S. Johnson, and had issue of her marriage with him, one son, the defendant Frank Hansford Johnson, who is an infant, now of the age of about eighteen years.

That in an action brought in the Superior Court of the County of Marin, in the State of California, wherein said Frank S. Johnson was plaintiff and said Mary B. Johnson was defendant, such proceedings were had, that the said Court, which had jurisdiction of the parties and subject matter of said action, made a decree on the 29th day of December, 1888, dissolving said marriage relationship between them, and granting a divorce; which decree was duly entered in said action, and recorded in the Clerk's office of said Court and County on the 2nd day of January, 1889, as by said decree and the said record thereof, reference being thereunto had, will more fully appear. That thereafter, and on or about the 7th day of December, 1889, at the City of New York, the said Mary Bryant Williams, the divorced wife of said Frank S. Johnson, was lawfully married to your orator, the complainant, George G. Goodrich;
6 that she departed this life at said City of New York, on or about the 3rd day of October, 1893, leaving her surviving, your orator, her husband, and her son, the defendant, Frank Hansford Johnson, who, under the laws of California and particularly under section 1386 of the Civil Code thereof, became and were her only heirs at law, and her real estate situated in the State of California, passed to and vested, one-half thereof in your orator, the complainant, George G. Goodrich, and one-half thereof in said Frank Hansford Johnson.

And your orator further shows unto your Honors, that the said Thomas H. Williams, Jr., was lawfully married to one Beatrice Steele on or about the — day of June, 1901, and that there is issue of said marriage, one child, the said Thomas H. Williams, (who is herein, throughout this bill, designated as Thomas H. Williams 2nd, to distinguish him from his father, said Thomas H. Williams, Jr., and his grandfather, said Thomas H. Williams, deceased), born on or about February 14th, 1903, and who is an infant under the age of fourteen years, and who, under the will and decree of distribution hereafter fully set forth, claims to have an estate or interest in said real property in the State of California, or some part thereof.

And your orator further shows unto your Honors that said Jennie R. Williams is the surviving wife of said George E. Williams, deceased, and said George E. Williams is the only issue of said George E. Williams, deceased, and said Jennie R. Williams, and that they are the only heirs at law of the said George E. Williams, deceased, and, that under said will and decree of distribution hereafter fully set forth, they claim to have an estate or interest in the said real
7 property situated in the State of California, or some part thereof.

And your orator further shows unto your Honors that the said Thomas H. Williams, deceased, prior to his decease, made and signed two papers, purporting respectively, to be his last will and testament, and codicil thereto, and that a true copy of said will,

marked "Exhibit A," and a true copy of said codicil, marked "Exhibit B," are annexed to this bill of complaint and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

And your orator further shows unto your Honors, that under the laws of the State of California, and especially under section- 715, 716, 771 and 749 of the Civil Code of California, the trust attempted to be created in and by the said will was at the time of its creation, ever since has been, and now is, void; that the absolute power of alienation of the property of said Thomas H. Williams, said testator, included in said attempted trust, was by said will, and by the terms of the trust thereby attempted to be created, suspended for the term of three years, and not for a period measured by the continuance of lives in being; and that, as to the property included in said attempted trust, the said Thomas H. Williams, died intestate, and that at his death the said property passed to, and vested in, his said heirs at law in the proportions before mentioned.

And your orator further shows unto your Honors, that in a proceeding in the Superior Court of the City and County of San Francisco, Probate Division, entitled "In the Matter of the Estate of Thomas H. Williams, Deceased," Numbered 5083, such proceedings were had that the said Court, by order, made and entered on the
6th day of April, 1886, admitted said will and codicil to
8 probate, and directed that letters testamentary thereupon be granted unto said George E. Williams, the executor and trustee therein named, and that thereupon he qualified as such executor, and on the same day letters testamentary were issued unto him, and he took possession of the estate of said Thomas H. Williams, included in said void trust, as such executor, and as testamentary trustee under said will, and entered upon the execution of said void trust, and carried on the business in which the said Thomas H. Williams was, at the time of his death, engaged, and continued so to do until the 5th day of January, 1897, when the said consent decree of distribution hereinafter fully set forth was made.

And your orator further shows unto your Honors, that the said Frank S. Johnson was, by an order of the Superior Court of Marin County, State of California, in a proceeding therein entitled "In the Matter of the Estate of Frank Hansford Johnson, a Minor," duly made and entered on the 11th day of March, 1889, appointed guardian of the estate of said infant, Frank Hansford Johnson; that on the same day said Frank S. Johnson qualified as such guardian, and letters of guardianship of the estate of said Frank S. Johnson were issued unto the said Frank S. Johnson; and that ever since then the said Frank S. Johnson has been, and now is, the guardian of the estate of said defendant, Frank Hansford Johnson, as by said order, duly filed and recorded in the office of the Clerk of said Marin County, reference thereunto being had, will more fully appear.

And your orator further shows unto your Honors, that on or about the 1st day of August, 1896, the said infant, Frank Hansford Johnson, applied by petition to said Superior Court of Marin
9 County, in said proceeding, entitled "In the Matter of the Estate of Frank Hansford Johnson, a Minor" for leave to

consent to a decree of distribution of said estate of said Thomas H. Williams, deceased, the terms and provisions of which had been previously agreed upon between said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, and said George E. Williams, testamentary trustee; and also for leave to consent to the appointment of appraisers to appraise said estate of said decedent pursuant to the terms and provisions of said void trust; that in said petition the facts of your orator's existence and of the marriage of your orator to Mary B. Johnson, the said divorced wife of said Frank S. Johnson, and his interest in said estate of said decedent, were fraudulently concealed from said Court of Marin County, although the existence of your orator and his said marriage and his said interest in the estate of said decedent, were well known to the petitioner, said Frank Hansford Johnson, and said Frank S. Johnson, his guardian, and to the other parties to said agreement, viz.: Thomas H. Williams, Jr., and said George E. Williams; and your orator further shows that the said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, did, with intent to deceive said Court, lead the Court to believe that the only persons interested in the said estate of said Thomas H. Williams, deceased, were the said infant, Frank Hansford Johnson, the said defendant, Thomas H. Williams, Jr., and the said testamentary trustee, George E. Williams; and further that at the time of making said application to said Court of Marin County for leave to consent as aforesaid, the said Frank Hansford Johnson, through his guardian, Frank S. Johnson, well knew that the said trust was void at its creation, and that the consent decree of distribution to which said minor asked leave to consent would work great injury, and defeat the rights of your orator to his share of the property embraced in said void trust; and that he, said Frank Hansford Johnson, through his said guardian, well knew that there were questions of law and fact which in good conscience should have been submitted to, and determined by, the said Court of Marin County, before the said minor should be permitted to consent that any distribution by consent decree, and before any other disposition of said trust property should be made; and your orator shows further that, before said petition to said Court of Marin County had been filed, an agreement had been made between said Thomas H. Williams, Jr., and said minor, through his guardian, said Frank S. Johnson, and consented to by said George E. Williams, that said questions of law and fact should be concealed and kept from said Court, and said consent decree of distribution, as in the petition of said infant was fully described, should be granted upon consent, by the said Superior Court of San Francisco, Probate Division, in the said proceeding entitled "In the Matter of the Estate of Thomas H. Williams, deceased," so that they might wrongfully and fraudulently obtain all of said estate of said deceased to themselves, and thereby wrongfully and fraudulently deprive your orator of his legal share thereof. That thereupon, such proceedings were had in said proceeding entitled "In the Matter of the Guardianship of the Estate of Frank Hansford Johnson, a Minor," in said Superior Court of Marin

County, that said Court, on the 1st day of August, 1896, made a decree permitting said minor through his said guardian to give such consent for said infant, as by reference to said petition filed, and said decree filed and of record in said last named matter in
11 the office of the Clerk of Marin County, reference being thereunto had, will more fully appear. And your orator further shows that he had no notice or knowledge of said proceeding or decree in said Court of Marin County until November, 1903.

And your orator further shows unto your Honors, that on the 7th day of August, 1896, the said Thomas H. Williams, Jr., filed his petition in the Superior Court, Probate Division, of said City and County of San Francisco, in said "Matter of the Estate of Thomas H. Williams, deceased" asking for the appointment of appraisers of said estate pursuant to the terms of said void trust contained in said will, and particularly of subdivision fourth of Item Four thereof. That said petition was subscribed and sworn to by said Thomas H. Williams, Jr., on the 4th day of August, 1896. That in said petition the fact of the marriage of your orator to Mary B. Williams, the divorced wife of said Frank S. Johnson, was fraudulently concealed from the Court, and your Orator's name or existence was nowhere mentioned therein. That said sworn petition falsely and fraudulently, with intent to deceive said Court, represented to said Court that George E. Williams, the executor and trustee acting under said will; said Frank Hansford Johnson, the minor; and said Thomas H. Williams, Jr., were the only persons, then living, interested in the distribution of the said estate, whereas the said petitioner, at the time of making said petition, well knew, and the said George E. Williams, Frank Hansford Johnson and Frank S. Johnson, and each of them, well knew of the marriage of your orator with Mary B., the divorced wife of said Frank S. Johnson, and well knew that your orator was one of her heirs at law, and was entitled as such (and your orator charges the fact so to be) to a distributive share of said estate, whether the said trust was void, or
12 whether it was lawful and good. That such proceedings were had upon said petition, that the Court directed notice to said George E. Williams, Frank Hansford Johnson, a minor, and Frank S. Johnson, the guardian of said minor, and to no one else, to show cause at a certain time and place why the said petition should not be granted as prayed for, and that such notice was given them and to them only. That upon the hearing of said petition they were the only persons interested in said estate who had been served with notice thereof, or were parties to said proceeding; and that your orator had no notice or knowledge thereof, and that your orator never was a party thereto, or had a day in Court therein. That on said hearing, to wit: on the 12th day of August, 1896, the said George E. Williams as executor of said will, and as trustee thereunder, appeared in said Court in his own proper person, and Frank Hansford Johnson, the minor, and Frank S. Johnson, his guardian, also appeared in open Court, and by their attorneys, and they all consented in open Court to an order appointing appraisers, and that the said Court thereupon, upon said consents, made said order, under the provisions of said void trust, as by said petition for appointment

of appraisers, and proceedings thereupon filed, in said matter entitled "In the Matter of the Estate of Thomas H. Williams, deceased" in the office of the Clerk of the City and County of San Francisco, August 7th, 1896, and said consent order appointing appraisers dated August 12th, 1896, and filed on December 11th, 1896, in said matter, in the said Clerk's office, reference being thereunto had, will more fully appear.

And your orator further shows unto your Honors, that the appraisers appointed by the consent order dated August 12th,
13 1896, aforesaid, did, pursuant to said order, appraise the property of said estate then in the hands of said George E. Williams as testamentary trustee under said void trust, at the sum of $1,465,800.08; whereof the value of the real estate which said Thomas H. Williams owned at the time of his death and which is fully described in the said decree of distribution, was $1,459,445.08, and the value of the personal property therein was $6,355.00, as by the report of said appraisers filed in said matter in the office of said Clerk of the City and County of San Francisco, reference being thereunto had, will more fully appear. And your orator further shows that the said real estate is worth at this time at least the amount of said appraisement, and that the interest of your orator therein which forms the subject matter of this suit or controversy, is worth more than five thousand dollars.

And your orator further shows to your Honors, that on the 15th day of December, 1896, the defendant, Thomas H. Williams, Jr., filed in said Superior Court of the City and County of San Francisco, in the proceeding entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," his petition upon oath as beneficiary under said void trust, for final distribution, under the terms of said will, of the estate embraced in said void trust; and at the same time the said George E. Williams also presented and filed in said proceeding his final account, and report of his administration of said estate, as such executor, together with a petition upon oath for the settlement of said account and the final distribution of said estate, in all of which your orator's existence and the fact of the marriage of your orator to Mary B. Johnson, the divorced wife of said Frank S.
14 Johnson, and of the interest of your orator in said estate as aforesaid, was, by said Thomas H. Williams, Jr., and said George E. Williams, fraudulently and with intent to deceive said Court, concealed from said Court, although your orator's existence and said marriage and his said interest in said estate were well known to both petitioners and each of them; and your orator further shows that said petitioners, with like intent, did, in said petitions, wrongfully and fraudulently inform the Court that the only persons interested in said estate, or in the distribution thereof, were the petitioner said Thomas H. Williams, Jr., and said Frank Hansford Johnson, and the testamentary trustee, said George E. Williams; and, further, that at the time of making said petition the said Thomas H. Williams, Jr., and George E. Williams, and each of them, well knew that the said trust was void in its creation, and that the consent decree of distribution for which they were about to apply to said Probate Court would work great injury to and defeat the

rights of your orator to his share of said trust property, and that they well knew that there were difficult questions of law and of fact which in good conscience should have been submitted to, and determined by the Court before any distribution by consent decree, or other disposition of said trust property, should be made. And your orator further shows that before said petitions were made or filed, the agreement aforementioned had been made between said Thomas H. Williams, Jr., and Frank Hansford Johnson, through his guardian Frank S. Johnson, that the property embraced in said void trust should be wrongfully and fraudulently distributed as in and by said consent decree of distribution done, which said agreement was
15 known, and consented to by said George E. Williams, said trustee; and it was also agreed between them that said questions of law and fact should be concealed and kept from said Court, and said consent decree of distribution should be made, so that they might wrongfully and fraudulently deprive your orator of his legal share thereof, as by said petitions and reports on file in said matter in the office of the Clerk of the City and County of San Francisco, reference being thereunto had, will more fully appear.

And your orator further shows unto your Honors, that in consequence of the concealments from, and false representations made to, the court as aforesaid; and in consequence of said consents as aforesaid, the said Superior Court of the City and County of an Francisco did, in said proceeding, entitled "In the Matter of the Estate of Thomas H. Williams, deceased," on or about the 5th day of January, 1897, render the consent decree of distribution aforesaid, which said decree was entered and recorded in said matter of said estate in the office of the clerk of the city and county of San Francisco, on the 5th day of January, 1897, and that a true copy of said decree of distribution marked "Exhibit C" is annexed to this bill of complaint, and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

And your orator further shows unto your Honors, that your orator was never made a party to the said proceeding in said probate court entitled, "In the matter of the Estate of Thomas H. Williams, deceased," in which the said will and codicil thereto were probated, or to any proceedings in the administration of said estate in said
16 matter; that said proceedings have not been revived or continued as against him since the death of his said wife, as required by Sections 385 and 1713 of the Code of Civil Procedure of the State of California, or otherwise, and that he is not and never has been a party thereto and had no notice or knowledge thereof; and that he had no notice or knowledge of any of the proceedings therein mentioned for the distribution of said estate; or of the action or decree of the court thereon; and that in said proceedings for said final decree of distribution, no day is, or was, or has been given to your orator, and that his first knowledge thereof, or of any thereof, was in November, 1903.

And your orator further shows unto your Honors, that before the hearing upon the petitions for final distribution aforesaid, said decree of distribution had been prepared by and agreed to by and between said minor, Frank Hansford Johnson, through his guar-

dian, said Frank S. Johnson, and said George E. Williams, executor and testamentary trustee of said void trust, and said Thomas H. Williams, Jr., and had been and was consented to by each of them, and that by force of said decree the whole of said real estate of said Thomas H. Williams then remaining in the hands of said George E. Williams, executor and testamentary trustee of said void trust, was wrongfully and fraudulently divided and distributed as follows: 40 per cent thereof to said infant, Frank Hansford Johnson, in fee, 26 and 2-3 per cent thereof to said defendant, Thomas H. Williams, Jr., in fee, and 33 and 1-3 per cent thereof was decreed to remain in the hands of said George E. Williams, testamentary trustee under said void trust, for the benefit of said Thomas H. Williams, Jr., during his life, as provided in said will, and thereafter in accordance with said void trust.

17

And your orator further shows unto your Honors, that said decree was obtained by fraud, concealment from, and deception upon the court, and by the unlawful confederation, connivance, collusion and consent on the part of said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his guardian, said Frank S. Johnson, and said George E. Williams aforesaid; that the court had no jurisdiction to distribute said estate under the terms of said void trust, as the same was void in its creation; and that, as to the said trust property, the testator died intestate, as aforesaid, and it passed to and vested in his heirs at law at the time of his death and to the heirs at law of said Percy, Sherrod, Bryant and Mary respectively, as they severally died, as before mentioned; that the concealment of your orator's existence and interest in the estate was a fraud upon the court. That the said consents were a fraud upon the court; that the said fraudulent concealment and fraudulent imposition upon and false representation to, the court, in obtaining said consent decree of distribution of the property embraced within said void trust, were by them used, made, done and perpetrated with the intent wrongfully to defeat your orator of his right as heir at law to the real estate of his said deceased wife.

And your orator further shows unto your Honors, that said defendants, Frank Hansford Johnson, through his guardian, Frank S. Johnson, and Thomas H. Williams, Jr., pretended that said decree of distribution was fairly and properly obtained; and that said trust was valid under the laws of the state of California; and that a day was given, in said proceedings to obtain said decree of distribution, to your orator to show cause against the same; and

18

that your orator is not entitled to attack the validity of said decree or the validity of said trust; or to obtain relief as against their fraudulent acts aforesaid; whereas your orator, the complainant, charges the contrary thereof to be true; and that said trust should be declared void; and that said consent decree of distribution, should be adjudged by this court to be nothing more than an agreement between said consenting parties thereto, namely, the said defendants, Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, testamentary trustee, for the fraudulent division among themselves of the share of the said real estate belonging to your orator; and your orator expressly charges that the said

alleged trust is void, and was void at its creation, and that as to the property involved in said trust, said Thomas H. Williams died intestate, and that under the circumstances aforesaid, the said defendants Thomas H. Williams, Jr., Frank Hansford Johnson and John W. Ferris, as successor of George E. Williams, trustee, became and are, by reason of the wrongful and fraudulent acts aforesaid, and by reason of the invalidity of said void trust, the trustees for complainant, your orator, of the share of the real estate of said Thomas H. Williams, deceased, described in said consent decree of distribution, to which your orator was and is entitled as aforesaid.

And your orator further shows unto your Honors, that your orator, not being a party to, and having no notice or knowledge of, the said probate proceedings in which said decree of distribution was made, could not appeal therefrom, and that his only remedy
19 to set aside said decree and obtain the relief herein prayed for, is by the interposition of a court of equity, and that under the laws of the State of California, the said probate division of the said Superior Court has and had no jurisdiction in that behalf.

And your orator further shows unto your Honors, that the said George E. Williams, trustee as aforesaid, departed this life on or about December 17th, 1899; and that thereafter an action was brought in the Superior Court of the City and County of San Francisco, State of California, wherein Thomas H. Williams, Jr., was plaintiff and Frank Hansford Johnson, a minor, Frank S. Johnson, guardian of the person and estate of said Frank Hansford Johnson, Frank S. Johnson, Jennie R. Williams, Executrix of the last will and testament of said George E. Williams, deceased, and Georgia E. Williams, were defendants, and that such proceedings were had in said action, that on the 21st day of May, 1900, a decree was made by said court appointing the defendant John W. Ferris trustee of said void trust, in the place and stead of said George E. Williams, deceased.

And your orator further shows unto your Honors, that your orator was never made a party to said last mentioned action, in which said John W. Ferris was appointed such trustee as aforesaid, and he is not and never has been a party thereto, and had no knowledge of, or notice of, the bringing or prosecution of said action, or the proceedings therein or any of them, or of the action or decree of the court thereon; and further that said Thomas H. Williams, Jr., and said Frank Hansford Johnson and Frank S. Johnson, guardian as aforesaid, parties to said action, did, at the hearing thereof,
20 fraudulently represent to said court in which said action was pending, that said Thomas H. Williams, Jr., said Frank Hansford Johnson and Jennie R. Williams, and Georgie E. Williams were the only persons interested in said estate of Thomas H. Williams, deceased, and they, said Thomas H. Williams, Jr., and Frank Hansford Johnson, and each of them, did fraudulently conceal from said court the existence of your orator and his marriage to Mary B. Johnson, and his interest in said estate, and that at said time and at all times during the pendency of said action, said Thomas H. Williams, Jr., Frank Hansford Johnson, through said Frank S.

Johnson, guardian as aforesaid, parties to said action, well knew of your orator's existence; and well knew that your orator had the interest aforesaid in the said estate of Thomas H. Williams, deceased; and well knew of the marriage of said Mary B. Johnson with your orator; and well knew that the said trust was void at its creation as aforesaid. That in consequence of said false representations and fraudulent concealments, and upon the consent of the parties to said action, the said Superior Court made the decree aforesaid, appointing said John W. Ferris trustee of said void trust, in the place and stead of George E. Williams, deceased, as by said decree and proceedings in said action, on file and of record in said action in the office of the clerk of the City, and County of San Francisco, reference being thereunto had, will more fully appear. And your orator further shows that your orator had no notice of said last mentioned action or of the decree of the said court therein until November, 1903. That said John W. Ferris duly qualified as such trustee, and gave the bond required by said decree, and took possession of, and still retains possession of, the 33 and ⅓ per cent. of the property dis-
21 tributed under said consent decree of distribution aforesaid, and which by the terms of said decree was left in the hands of said George E. Williams, as trustee, for the purpose of said void trust.

And your orator further shows unto your Honors, that under the laws of the State of California, and particularly under section 2224 of the Civil Code, the said Thomas H. Williams, Jr., and said minor, Frank Hansford Johnson and said John W. Ferris, testamentary trustee, (by reason of the fraudulent and wrongful acts and concealments of said Thomas H. Williams, Jr., and Frank Hansford Johnson as aforesaid and the invalidity of said void trust, as aforesaid) became and are trustees for your orator of the share of said real estate described in said decree of distribution belonging to your orator as aforesaid, and wrongfully and fraudulently gained by said Thomas H. Williams, Jr., Frank Hansford Johnson and George E. Williams, Trustee, and distributed among them by the fraudulent and consent decree of distribution under said void trust as aforesaid.

And your orator further shows that although the facts of the existence of your orator, that he was a citizen of New York State, and resided in the City of New York, were well known to the defendant Thomas H. Williams, Jr., Frank Hansford Johnson, through his said guardian, and said George E. Williams; and although your orator was entitled to reasonable and sufficient notice of the proceedings about to be taken by them, said defendants as aforesaid, for the distribution of said estate, they did, in order the more effectually to accomplish their said fraudulent purposes and design, and in order to obtain an apparent jurisdiction over your orator, obtain from
22 said Superior Court of the City and County of San Francisco, upon the filing of their said petitions for distribution, orders purporting to fix —— the 26th day of December, 1896, for the hearing of said petitions and directing that notice thereof be given by posting the same in three public places in said City and County of San Francisco. That pursuant to said order, notices were posted in three places in said City and County, to wit, one at the public Morgue,

one at the place where the said court was held, and one at the United States Court building; but said notices did not specify the true time fixed, as aforesaid, for such hearing, nor did either of them; that said posting was, by said order, directed to be made ten days before the said day fixed for the hearing of said petitions for distribution. That the said period of ten days was an insufficient time for your orator, who resided in New York, to have by any possibility obtained knowledge of said notices and to have prepared for the hearing of said proceedings for distribution, and that said notices and the proceedings had in pursuance thereof were not and did not constitute due process of law within the meaning of Section 1 of Article XIV of the Constitution of the United States, and your orator never had his day in court in said proceedings for distribution, and the same as to him were and are void, and your orator therefore avers that by reason of the proceedings had and taken by the defendants, said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his guardian said Frank S. Johnson, and the said George E. Williams, as aforesaid, in the matter of the distribution of said estate of said Thomas H. Williams, deceased, your orator has been deprived of his
23 said interest in said real property of said decedent without due process of law, within the meaning of said Section 1 of said Article XIV of the Constitution of the United States.

And your orator further shows unto your Honors that immediately upon the making of said decree of distribution, "In the Matter of the estate of said Thomas H. Williams, deceased," the defendants, Thomas H. Williams, Jr., and Frank Hansford Johnson and the said George E. Williams, trustee as aforesaid, severally took possession of the property set apart to them respectively by said decree of distribution, and the said defendants Thomas H. Williams, Jr., and Frank Hansford Johnson have ever since then retained, and do yet hold possession of the property set apart to them respectively as aforesaid by said decree of distribution; and have received and collected the rents, issues and profits thereof, all of which they have appropriated to their own use; that such rents, issues and profits aggregate a large amount of money, the precise amount of which your orator, having had no means of ascertaining the same, is unable to state and seeks discovery thereof, that the said George E. Williams, trustee, continued to hold and retain until his death, as aforesaid, the possession of the 33 and ⅓ per cent. of said estate awarded to him by said decree of distribution, and after his death the same passed into the possession of the defendant John W. Ferris, trustee, as aforesaid, as the successor to the said George E. Williams as such trustee, and the defendant John W. Ferris, trustee, still retains and holds the same and during all that time has received the rents, issues and profits thereof, of the times and amount of which your orator seeks discovery; that by reason of the taking and retention by the
24 defendant, Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, trustee as aforesaid, and after his death, by the defendant John W. Ferris, acting as his successor, of that portion of the said property to which your orator is entitled, as aforesaid, under the fraudulent acts and circumstances

as aforesaid, and by reason of the invalidity of said Trust as aforesaid, the defendants Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams became, and they the said defendants and said defendant John W. Ferris, trustee, are now the trustees for your orator of the property, as aforesaid, to which your orator, is entitled, as herein alleged, under the general principles of equity jurisprudence, and also under the provisions of the statutes of the State of California commonly known as the Civil Code of said State, and Sections 2223 and 2224 thereof,

And your orator further shows unto your Honors, that in and by the provisions of the Statute of the State of California, commonly known and called the Code of Civil Procedure of said State, and by section 1633 thereof, it is provided as follows:

"When any account is rendered for settlement, the clerk of the "court must appoint a day for the settlement thereof, and thereupon "give notice thereof by causing notices to be posted in at least three "public places in the county, setting forth the name of the estate, "the executor or administrator, and the day appointed for the settle- "ment of the account. If, upon the final hearing at the time of the "settlement, the court, or a juge thereof, should deem the notice in- "sufficient from any cause, he may order such further notice to be "given as may seem to him proper."

That by section 1634 of said Code, it is provided as fol-

25 lows:

"When settlement is final, notice must so state. If the "account mentioned in the preceding section be for a final settle- "ment, and a petition for the final distribution of the estate be filed "with said account, the notice of settlement must state those facts, "which notice must be given by posting or publication for at least "ten days prior to the day of settlement. On the settlement of said "account, distribution and partition of the estate to all entitled there- "to may be immediately had without further notice or proceed- "ings."

That the account alleged to have been filed in the said Superior Court of the City and County of San Francisco Probate Division in the proceedings entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," on the 15th day of December, 1896, was an account filed for a final settlement of said estate; and the petitions for distribution of said estate filed by said George E. Williams, Executor, and the defendant Thomas H. Williams, Jr., were filed by them and each of them for a final distribution of said estate, and the report hereinbefore referred to as having been filed by said executor on said 15th day of December, 1896, was filed as and for his final report of his administration of said estate; that under and by the provisions of said sections of said Statute as hereinbefore recited, it is provided that the notice to be given of the hearing to be had on such settlement of said final account and of such petitions for final distribution must be given by posting or publication for at least ten days prior to the day of settlement.

Your orator further shows that the said Statute further

26 provides that upon the final hearing at the time appointed for such settlement, the court or the judge thereof, if he deem

the notice given to be insufficient from any cause, may order such further notice to be given as may seem to him proper and as provided in and by the terms of said section 1633;

That pursuant to the section last above mentioned of said Code of Civil Procedure of said State, the said Superior Court of the City and County of San Francisco, in said proceeding made an order directing that notice of the settlement of said final account and of the hearing of said petitions for distribution be given by the posting of notices in three public places in said City and County of San Francisco, and that such posting should be made ten days before the date fixed as aforesaid, for the settlement of said final account and the hearing of said petitions for final distribution. That the time as fixed by said order of court was the minimum time allowed by the provisions of said Code of Civil Procedure, to wit: ten days. That by reason of the fraudulent concealment of the existence of your orator; and of the fact that he resided in, and was a citizen of, the State of New York; and of the fact that he was entitled to a distributive share of the estate of said Thomas H. Williams, deceased, whether the said trust were void or valid; and also by reason of the false and fraudulent representations to said court made as aforesaid by defendants Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, the said court was imposed upon, and led to believe, and did believe, that there were no persons interested in said estate other than the said Thomas H. Wil-
27 liams, Jr., and Frank Hansford Johnson and said George E. Williams, and by such inducements the minimum time was fixed, as aforesaid, by said court for the giving of such notice, when in fact and in truth the time as thus fixed was not a reasonable time of notice, and did not, and could not, give to your orator any notice of the said proceedings, or any of them, and did not, and could not, afford him any opportunity to appear in said matter or to be heard therein; that upon the final hearing, at the time of such settlement, the defendants, Thomas H. Williams and Frank Hansford Johnson, through said guardian, and said George E. Williams, continued such concealment and said fraudulent misrepresentations to said court, otherwise said court would have deemed the said notices insufficient, and would have ordered further and other notice to be given to your orator.

And your orator further shows unto your Honors, that he has not been in the State of California at any time since the death of his wife, as aforesaid, except for a few days immediately after her death, when he brought her remains to San Francisco for interment. While in San Francisco the said George E. Williams declared to your orator that his said wife had no interest in the estate of her deceased father, or property of any kind or character whatever, and that she left no estate; and your orator thereupon returned to his residence in the State of New York. That at the time of the death of your orator's said wife she was indebted to a firm of jewelers in the City of New York to the amount of several thousand dollars, and the creditor demanded payment of said indebtedness from your orator. That when in San Francisco your orator informed said

George E. Williams of these facts and inquired of him
28 whether the said wife of your orator had left any property or estate available for the payment of said demand, and the said George E. Williams assured your orator, and represented, stated and declared to him, that she had left no property or estate whatever, and your orator believed and relied upon the representations, declarations and statements of said George E. Williams, as aforesaid, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife; and being so induced, he did thereafter abstain from any such inquiry, and he knew nothing at all of the fact that he was entitled to any property as heir-at-law of his deceased wife, or under said will of Thomas H. Williams, deceased, until the month of November, 1903, when, in the City of New York, his attention was first called to said matter by a stranger, who while in California pursuing an investigation not at your orator's instance, and not concerning him or his interest, had himself discovered the fact that your orator was entitled as aforesaid, whereupon your orator took steps at once to ascertain the facts connected with his interest in said property as hereinbefore stated, and retained counsel to prosecute the necessary inquiries relating thereto, and also to enforce such rights as your orator may have in the premises.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

29 1. Whether the said Thomas H. Williams died at the time and place mentioned, or if not, at what time and place did he die?

2. Whether Sherrod Williams, Percy Williams, Bryant Williams and Mary B. Goodrich died in the order above named, or in what order did they die?

3. Did Sherrod Williams, Percy Williams, Bryant Williams and Mary B. Goodrich respectively die at or about the times above stated, or at what time did they respectively die?

4. Whether upon their respective deaths they severally left the heirs at law as above stated, or what other or different heirs at law did they respectively have at their respective deaths?

5. Whether said Thomas H. Williams left no wife as above stated?

6. Whether the only heirs at law of said Thomas H. Williams, at his death, were Sherrod Williams, Thomas H. Williams, Jr., Mary B. Goodrich, Percy Williams and Bryant Williams, as above stated, or what other and different heirs at law did he leave at his death?

7. Whether at the time of the death of said Thomas H. Williams the mother of said children and heirs at law was dead?

8. Whether said Percy Williams married and had issue as above stated, or to whom and when and where was he married, and what issue was born of said marriage?

9. Whether the issue of said Percy's marriage died as above stated, or when and where did such issue die?

30 10. Whether said Sherrod Williams left no wife or lawful issue as above stated?

11. Whether said Bryant Williams died unmarried and without lawful issue, as above stated?

12. Whether said Mary B. Williams was married to said Frank S. Johnson as above stated, and when and where was she married to him, and whether she had as issue of said marriage defendant Frank Hansford Johnson, as above stated?

13. Whether said issue is of the age above stated or of what age is he?

14. Whether the said George E. Williams, after taking possession of said estate, administered it in accordance with the provisions of said will and codicil, and did continue the business of the said Thomas H. Williams as above stated, or in what other or different way did he manage the said property?

15. For how long did he continue to administer the property of the estate of said Thomas H. Williams, deceased, under the provisions of said will, or how otherwise did he manage or administer said estate, and for how long?

16. Whether said Thomas H. Williams, Jr., pretended that George G. Goodrich, the complainant, was given a day in court in said probate proceedings, in the said Superior Court of the City and County of San Francisco, Probate Division in the proceeding entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," to show cause against the said decree of distribution or any other proceedings therein, and state particularly in what manner, and how, it is pretended or claimed by said Thomas H. Williams, Jr., that the complainant was given a day in court in said proceedings in said matter, to show cause against the said decree, or against any, and which, of the said proceedings in said matter?

31 17. Whether said Frank Hansford Johnson, through his said guardian Frank S. Johnson, pretended that George G. Goodrich, the complainant, was given a day in court in said probate proceedings, in the said Superior Court of the City and County of San Francisco, Probate Division, in the proceedings entitled "In the Matter of the Estate of Thomas H. Williams, deceased," to show cause against the said decree of distribution or any other proceedings therein, and state particularly in what manner, or how, it is pretended or claimed by said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, that the complainant was given a day in court in said proceedings, in said matter, to show cause against the said decree, or against any and which of the said proceedings in said matter?

18. Whether the said Thomas H. Williams, Jr., refuses to account to the complainant, as his trustee, for the share of the property described in said decree of distribution, and for the rents and profits thereof, in his hands, to which complainant is entitled as above stated?

19. Whether the said Frank Hansford Johnson through his said

guardian, Frank S. Johnson, refuses to account to the complainant, as his trustee, for the share of the property described in said decree of distribution, and for the rents and profits thereof, in his hands, to which complainant is entitled as above stated?

20. Whether the said John W. Ferris, upon his appointment and qualification as trustee as the successor of George E. Williams, as above stated, took possession of the property described in said decree of distribution and set apart thereby to George E. Williams as such trustee, and whether he still has such possession thereof, and
32 what, if any, disposition has he made of the same, or any and which part thereof; and what, if any, incumbrance has he placed, or permitted to be placed, thereon, or any and what part thereof; and what, if any, rents and profits thereof have come into his hands, since the said property came into his possession; and whether any part thereof has been sold or exchanged for other property; and if any part thereof has been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of; and how was any property purchased with such proceeds disposed of; and by what authority said alienations or incumbrances, or re-investments and each of them were done, made or suffered?

21. Whether the said Thomas H. Williams, Jr., took possession of the property described in said decree of distribution as set apart to him in fee, and whether he still has possession of the same; and what, if any, disposition has he made of the same, or any, or which, part thereof; and what, if any, incumbrance has he placed or permitted to be placed thereon; or on any, and which part thereof; and the extent and nature of such incumbrance or incumbrances; and what, if any, rents and profits thereof have come into his hands since the same came into his possession; and whether any part of said property has been sold or exchanged for other property; and if any part thereof has been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of; and how, if at all, was any property purchased with such proceeds disposed of; and by what authority said alienations or incumbrances, or re-investments, and each of them, were done, made or suffered?

33 22. Whether the said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, took possession of the property described in said decree of distribution as set apart to him in fee; and whether he still has such possession; and what, if any, disposition has he made of the same or any and which part thereof; and what, if any, incumbrance has he placed or permitted to be placed thereon, or on any, and which part thereof; and the extent and nature of such incumbrance, and what, if any, rents and profits thereof have come into his hands since the same came into his possession, and whether any part thereof has been sold or exchanged for other property; and if any part thereof has been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of; and how, if at all, was any property purchased with such proceeds disposed of; and by what authority said aliena-

tion or incumbrances, or re-investments and each of them, were done, made or suffered?

And that the said decree of distribution may, for the reasons aforesaid, be decreed by this Honorable Court to be fraudulent, and of no force and effect as against your orator.

And that this Honorable Court will decree that the trust attempted to be created by said will of said Thomas H. Williams, deceased, was void at its creation, and that as to the said real estate embraced in said void trust the said Thomas H. Williams, died intestate, and that at his death the said real estate passed to, and vested in, his said heirs at law; and that your orator on the death of his said wife, became entitled to seven thirty-seconds of said real estate then in the hands of George E. Williams, Executor and trustee under the will
34 of Thomas H. Williams, deceased.

And that the defendants Thomas H. Williams, Jr., Frank Hansford Johnson, Frank S. Johnson, and John W. Ferris will severally make discovery of the property to which the complainant is entitled and which has come into their hands under said decree of distribution, and of the proceeds of the sale of any thereof and of the rents, issues and profits thereof by them severally or jointly received:

And that this Honorable Court will decree that said defendants, Thomas H. Williams, Jr., Frank Hansford Johnson, and John W. Ferris, are trustees for your orator of that part of the real estate of said Thomas H. Williams, deceased, to which your orator is entitled as heir at law of his deceased wife, said Mary Bryant Goodrich, and which came into their possession, as aforesaid under said decree of distribution and the rents and profits thereof received by them, said Thomas H. Williams, Jr., Frank Hansford Johnson and John W. Ferris, and that said real estate, and the proceeds thereof, if sold by them, is charged in their hands with a trust in favor of your orator to that extent.

And that a receiver may be appointed according to the course and practice of this Court, with the usual powers of receivers in like cases, of the said property to take and hold the same and to collect the rents and profits thereof during the pendency of this suit, and upon the final decree herein to make such disposition of such property as in and by said decree directed and to obey each and every other order or decree herein.

And that an accounting be had under the direction of this Honorable Court of the real estate which came into the hands of defendants, Thomas H. Williams, Jr., Frank Hansford John-
35 son and George E. Williams, Trustee, and his successor, the defendant John W. Ferris, under said decree of distribution, and the rents and profits thereof; that upon said accounting it be ascertained to what portion of said real estate, and of the rents and profits thereof, your orator is entitled from said defendants, and each of them; that as to the portion to which your orator is entitled, they and each of them, may, by decree and order of this Honorable Court, be ordered severally to convey and transfer to your orator such part so found due from each of them, or the value thereof, to be ascer-

tained by this Honorable Court, and that they and each of them be enjoined and restrained during the pendency of this action and perpetually thereafter from conveying, alienating or incumbering the said real estate, or its proceeds if sold, until the share and proportion of said real estate and the rents and profits thereof to which your orator is entitled, and which the Court shall find said John W. Ferris, Frank Hansford Johnson and Thomas H. Williams, Jr., either severally or collectively, wrongfully in possession of, or the value thereof, be conveyed and transferred to your orator, and until the said defendants, John W. Ferris, Thomas H. Williams, Jr., and Frank Hansford Johnson, and each of them, shall be discharged and released from the trust in your orator's favor which has become a charge against said real estate of its proceeds, in their and each of their hands, to the extent of the interest of your orator therein, and your orator prays for such other and further relief as the nature of this case may require and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpœna to be directed to the said John W. Ferris, of San Fran-
36 cisco, a citizen of the State of California, Frank Hansford Johnson, an infant, of the age of 18 years, whose estate is under the custody and control of Frank S. Johnson; and Frank S. Johnson, as guardian of the estate of said Frank Hansford Johnson, both of the City of San Rafael, State of California; Thomas H. Williams, Jr., of San Francisco, a citizen of the State of California, Georgie E. Williams of San Francisco, Cal., and Jennie R. Williams of San Francisco, Cal., heirs at law of George E. Williams, deceased, citizens of California; and Thomas H. Williams, an infant, who resides with its father, Thomas H. Williams, Jr., at San Francisco, thereby commanding them and each of them at a certain time, and under a certain penalty therein to be limited, personally to appear before your honors, in this Honorable Court, and then and there full, true and correct and perfect answer make, under oath, to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree therein as to your Honors shall seem agreeable to equity and good conscience.

GEORGE G. GOODRICH,
Complainant.
JOHNSON & JOHNSON,
Complainant's Solicitors.

JAMES A. LOUTTIT,
HENRY ARDEN,
MONROE & CORNWALL,
Of Counsel.

37 *Note Specifying the Interrogatories which Each Defendant is Required to Answer.*

Your Orator specifies the interrogatories which each defendant is required to answer, as follows:

I.

Defendant John W. Ferris is required to answer Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 20.

II.

Defendants Frank Hansford Johnson and Frank S. Johnson are required to answer Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19 and 22.

III.

Defendant Thomas H. Williams, Jr., is required to answer Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18 and 21.

IV.

Defendants Thomas H. Williams 2d, George E. Williams and Jennie E. Williams are required to answer Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

JOHNSON & JOHNSON,
Complainant's Solicitors.

38 EXHIBIT A.

The Last Will and Testament of Thomas H. Williams.

I Thomas H. Williams, a resident of the City and County of San Francisco, State of California, do will and bequeath as follows:

Item 1. That my body, be laid by that of my late wife, Mary Rebecca.

Item 2. That my executor pay, all just claims against my estate, from the income thereof; or sales if necessary; or money borrowed.

Item 3. I make the following special bequests, to be satisfied by my executor by delivery of property and from the income of my estate. To *by* beloved daughter, Mary Bryant, my household furniture and pictures; to my son Percy, my library and furniture; microscope, and crystal sleeve buttons; To my son Thomas H. Jr. my gold watch; To my son Bryant the remained of my jewelry. Two Hundred Dollars for Frank S. Johnson, to be invested in a present. To my brother George E. Our late mother's Bible, and three hundred ($300) Dollars, to be invested in an appropriate present. The following sums to be used by the respective parties in the purchase of appropriate presents or "keep sakes." One Hundred ($100) Dollars to each of my sisters Lizzie and Jennie; and Fifty

($50.00) Dollars to each of their children. My friend David Bixler One Hundred ($100) Dollars, Geo. W. Gordon Fifty ($50.00) Dollars, and my servant George Adderson Fifty ($50.00) Dollars.

Item 4. When the term of three years after my death, shall have elapsed, unless the executor, herein named, shall for good cause extend it for two years, or in case there be another executor, three of my children, or representatives, shall by writing, extend it for
39 two years, distribution of my estate, shall be made, as herein directed:

First. There shall be set aside absolutely, in property or money, theretofore realized from sales of property, the sum of Two Hundred ($200,000.) Thousand Dollars, for the benefit of my daughter. Second; There shall be vested absolutely, in Percy, property or money, Fifty Thousand ($50,000.) Dollars. Third; From the remainder of the estate, there shall be set aside, the sum of One Hundred Thousand ($100,000.) Dollars, to each of my sons Thomas H. Jr.; Percy; and Bryant, or such proportions of those sums as the estate may be worth. Fourth; The sum of One Thousand ($1000.) Dollars each, shall be invested, for the benefit of my niece Mary Thomas, and my grandson Frank Hansford, to be paid over, with interest at majority. Having thus disposed of Five Hundred and Fifty two ($552,000.) Thousand Dollars, I direct that the remainder of my estate, shall be set aside, in equal shares, for my said daughter, Mary Bryant; said son Thomas H. Jr; and said son Percy. But from the sums first herein devised, to each of my children, I direct the following deductions. The sums advanced to them respectively, before distribution, and from that of Thomas H. Jr., the sum of Four Thousand Four Hundred and eighty six and 45/100 ($4,486.45) Dollars, with interest thereon, at the rate of six (6) per cent. per annum, from the first day of August A. D. 1884, said interest to be compounded annually, by adding to the principal. The distribution, herein to be made, of property, or money to be invested in property, and in separate, or joint parcels, as the interest of distributees, may dictate. My daughter however shall for the first Two Hundred Thousand ($200000.) Dollars, select any pieces of property,
40 or interest to that extent, undivided, in any piece of property, she may direct or desire. The following plan, as may as near be, be followed for distribution. The Court *court* having jurisdiction of matters, pertaining to this will, shall appoint, appraisers of the estate, each of the children interested, being heard. The appraisers, consulting said children, shall appraise, and make written return of description, and value. The Court shall hear objections to the return, and finally settle the matter. The children, shall make their selections, either of pieces, or parcels, or parts in an entire property. If they cannot agree upon order, or choice in selection, it will be determined by the Court, upon "lot" or other design. When property has been selected, or an interest selected, the Court shall enter a decree, or order, to that effect, vesting it for the benefit, of the party named. To illustrate: Suppose my daughter shall take, One Hundred Thousand Dollars, or Two Hundred Thousand in a given piece of property, the Court shall by decree, vest that interest

for her benefit, in the property, in the same proportion, that the amount of selection, bears to the whole value of the property, leaving the remainder, to be selected by another, or others. I would advise that each of the three; Mary, Tom and Percy, take equal proportions unsegregated, of unreclaimed swamp lands.

Item 5. When I speak of sons herein, I mean Thomas H. Jr; Percy, and Bryant, and when I speak of children, I mean them and their sister. I do not include Sherrod Williams Jr. and do not recognize, or provide for him in any manner, and expressly declare, that it is my will, that he shall not inherit, any portion of my
41 estate, either directly, or indirectly, by the death of any one of my said children, or any grandchild.

Item 6. The first Fifty Thousand ($50000.) Dollars, given to Percy, is intended to vest in him absolutely. But the remainder of the estate, is only intended for the use and benefit, of the children, during their respective lives, with remainder in fee to those herein named. If my daughter dies, leaving two children, or more, or one child, and the children, or child of another, then the estate set aside for her benefit, shall vest in said child, or children, or grandchildren *per stirpes*,—as the case my be. If she leaves one child, or the child, or children of one child, then said estate shall vest one half in said child, or said grandchild, or children, and the other half, in Thomas H. Jr; and Percy, or in case of their death, in the same person, or persons, other portions of the estate left for their benefit, do vest, In case of the death of Bryant without a child, children or grandchildren, the estate set aside for him, will become a part of the estate already set aside, for the other children, and will be used, or descend as other estate, set aside for them, or if that be not lawfully done, it shall vest in the child or children of Mary one share, and Tom, and Percy, or their heirs, one share each, or if Mary have no child, or grandchild, then the whole in Tom, and Percy, or their respective heirs. If Bryant leave a child or children, or grandchild, or children, then the estate set aside for him, will vest in said child, or grandchild, or children, *per stirpes*. In case of the death of Thomas H. Jr, the estate set aside for him, shall vest in his child, or children, or grandchildren,—if any—*per stirpes*. But if he leave no child, children, or grandchildren, then it shall vest, in, one
42 share, in the child, or children, or grandchildren, *per stirpes*, of Mary, and one share in Percy, or if he be dead in his child, children or grandchildren *per stirpes*, or if he leave no child, or children, or grandchildren, then the entire property, in the child, children, or grandchildren, of Mary, or if she have none; then in my brother Geo. E. Williams, or his heirs. In case of the death of Percy, the estate set aside for him, shall vest in his child, children, or grandchildren, *per stirpes*, if he have either, or any of them. If he have not; then one half, shall go to the child, children, or grandchildren, *per stirpes*, of Mary, and the other half to Tom H. Jr, if he be alive, or if he be dead, and have left no child, or grandchildren, then the whole to the said child, children or grandchildren of Mary, or if she have no child, children or grandchildren, then entire to those of Tom. Or if neither Tom be alive, and he or Mary have no child,

children, or grandchildren, then to vest in my brother Geo. E. or his heirs. It being understood, that any estate set aside for Tom, who dies without child, or grandchildren, is intended to be divided, between Percy, or the heirs of his body, or the heirs of Mary's body, and grandchildren, or if Mary has, or has not left any, then to Percy, and his heirs, or if he be dead then to Mary's heirs, or if Percy be dead, and have left none, and Mary has none, or has left none, then to my brother or heirs. The same rule, in regard to estate left Percy, substituting the name of Tom. I do not desire, that more than one half of the estate, set aside for Mary, shall vest in one child, or the children or child of one child, nor do I desire, that Bryant shall inherit anything, by the death of either of the other children.

43 Item 7. I hereby declare, any and all conveyances, by any of the children herein named, of any estate left for his, or her benefit, void. That neither of them, shall in any manner, dispose of, in advance, or anticipate, the income, or any part thereof. But that said income, shall be given, or paid over, as the same arises, or accrues. Until distribution aforesaid, my executor may advance to each of said children as follows: To my daughter, Two Hundred and Fifty ($250.) Dollars, per month, and to each of the three sons, One Hundred ($100.) Dollars per month.

Item 8. I hereby appoint my brother George E. Williams, executor of this will, and that no bonds, or security, be required of him, for the execution of the trust, or discharge of the office.

Item 9. That no confusion may arise, in reference to title to any property, of my estate, I hereby devise, that all of the property, of which I die the owner, or which may in any way, become part of my estate, vest absolutely, in my executor herein appointed, and his successor, or successors, in office. That the title thereto, be held by him, or his said successor, or successors in office, until by death of my said several children, the property set aside, for each, be vested in their respective heirs, as herein provided, said executor, or his successor, or successors, to hold said property, and every part thereof, in trust for the uses, and purposes in this will mentioned, and for the use, and benefit of my children as herein provided.

Item 10. To the Executor, herein appointed, I give, and grant, the following powers, and authority: 1: To carry on all business, in which I was engaged, at the time of my death. 2. To
44 borrow money for the use of such business, or the benefit of my estate. 3. To bargain, sell and convey, any portion, or part, of the property of my estate, without any order of Court, or other proceeding, and to execute all mortgages, or conveyances, necessary, or deemed proper, by him. 4. To sell and convey, any part, or parcel, of property, set aside, for any one of my children, after distribution, as herein provided for, that he may re-invest the proceeds, for the distributee. In that case, his conveyance, to be valid, may only recite, that he sells, for re-investment, and when he re-invests, it will be only necessary, to show by the conveyance, for whose ultimate benefit, the property is taken. It will be understood, that the terms "conveyance" as here used, implies transfers of property, real, personal, or mixed. It being understood further,

that no action of any Court, or consent of any person be necessary to execute these powers, having entire confidence, that he will act for the benefit of my children. I request of said executor to have all income of my estate, or sales of property, invested in property, or government securities, or in notes, bonds, or mortgages, for which property has been sold, at the time of distribution; except the Fifty Thousand ($50000.) Dollars, absolutely given Percy, which may be given in money, or property as desired.

Item 11. In case of the refusal, or death, or resignation of my brother, as executor, then his successor, or successors, must be appointed by the Court, having jurisdiction of this will, or some court, of competent jurisdiction. In that event, I request the appointment of such person, as may be selected by half or more of
45 my children. If however that many can agree the Court, must exercise its discretion, by appointing, one selected by some one of said children. An executor, appointed by the Court, may only exercise such powers, or authority, as may be authorized by law. As the title to property may be in such executor, he may after distribution herein provided for, sell and convey, any piece, or parcel of property, or interest therein, for the purpose of re-investing the proceeds of sale, for the benefit of the distributee, or person for whom held, provided; that the said distributee, or person for whom the same is held, join in the conveyance, or by writing, properly executed, consent to the sale, and conveyance. The proceeds of sale, must at once be invested in property, or held in government securities, or bonds or notes with mortgage, for which the property was sold. In all cases under this will, in which my daughter is required to act, there shall be no necessity, for the joinder of her husband, but she shall act, as though a *feme sole*.

Item 12. In the event my brother, executes this will, I direct that the court, having jurisdiction, make him a fair, liberal allowance, for all services, without reference to statutory, or other fees. In case of another appointment, I direct that the compensation of the executor, so appointed, be fixed before, and at the time of appointment, and that he be paid accordingly, and not otherwise. Will also direct, that the appointment of one of my sons, may not be objectionable, and in conveyance of property, in which he may be distributee, his personal assent may be expressed in the same instrument.

Item 13. This will is lengthy, but I hope it clearly expresses my purposes thus.

46 That with the exception of Fifty Thousand ($50000.) Dollars, the property of my estate, is to be "set aside" in and for the benefit of my children, Thomas H. Jr; Mary Bryant, and Percy; and Bryant, at the time of distribution, in the proportions of Two hundred thousand ($200,000.) Dollars to Mary, and One Hundred ($100,000.) Dollars to each of the others, with division between Mary, Tom, and Percy, of the remainder of the estate. That each of said children is to have the net income of the estate "set aside" for them respectively. That the legal title is to be, and remain in an executor, of the whole estate and each part thereof, until death

inflicts her blows. That when a child dies, the estate "set aside," for him, or her, vests absolutely in his or her heirs, as herein provided, except in case of Bryant as hereinbefore mentioned, leaving the title, in remainder, in the executor, until each of the children, herein named, be dead.

In testimony whereof I have hereunto set my hand and affixed my seal at the City and County of San Francisco State of California, on this 29th day of October, A. D. 1885.

THOS. H. WILLIAMS. [SEAL.]

I made the following changes before signature. In line 16 page 1 I inserted "by delivery of property and." By striking out "the title" in line 21 page 5 and inserting "it"——. By striking out "said" and inserting "set" in line 5 page 12.

In testimony whereof I have hereunto set my hand and affixed my seal at the City & County of San Francisco, Cal.—my present residence on this the said 29th day of October, A. D. 1885.

THOS. H. WILLIAMS. [SEAL.]

47 (Endorsed:) Last will and Testament of Thos. H. Williams, Filed in the office of the Clerk of the Superior Court, in and for the City and County of San Francisco, State of California, this 11th day of March, A. D. 1886. Jas. J. Flynn, Clerk, By P. J. Krausse, Deputy Clerk.

48 EXHIBIT B.

Codicil.

I, Thomas H. Williams, of the City of San Francisco; State of California, do make and ordain this as a codicil to my last will and testament.

1. In case her circumstances require it, my executor may add to the monthly allowance of my daughter until distribution of my estate. I would suggest that he advise with Tom and Percy on the question.

2. For good reasons my executor may reduce the monthly allowance to Bryant until distribution.

3. An investment may be made at any time in a residence for my daughter to be occupied by her '& family, said investment from her share of the estate, said property or residence to be held subject to all of the conditions and terms of the will as to other property.

In testimony whereof I have hereunto set my hand and affixed my seal at the City of San Francisco aforesaid, on this the 23rd day of January, A. D. 1886.

THOS. H. WILLIAMS. [SEAL.]

(Endorsed:) Filed in the office of the Clerk of the Superior Court, in and for the City and County of San Francisco, State of California, this 11th day of March, A. D. 1886. Jas. J. Flynn, Clerk, By P. J. Krausse, Deputy Clerk.

49 EXHIBIT "C."

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of THOMAS H. WILLIAMS, Deceased.

George E. Williams, executor of the last will and testament of said Thomas H. Williams, deceased, having on the 15th day of December, 1896, rendered and filed in this court his final account as such executor with a petition for a settlement of his administration and for distribution of said estate, and due notice of the filing of said account having been given as by law required, and Saturday December 26th, 1896, at 2 o'clock P. M. having been set and appointed by this court as the time for the settlement of said account, and said George E. Williams being then present in open court in his own proper person, and Thomas H. Williams, Jr., being present in his own proper person and by his attorneys Messrs. Rothchild & Ach, and Frank Hansford Johnson, a minor being present in open court by and through his guardian, Frank S. Johnson, and by Messrs. Chickering, Thomas & Gregory, and J. W. Dorsey, Esq., his attorneys,

And Thomas H. Williams, Jr., having also filed in this court on the 15th day of December, 1896, his petition for distribution of said estate, and in and by his said petition and in open court by and through his attorneys having approved the said final account of said George E. Williams, and joined the said George E. Williams, executor, as aforesaid in his petition for distribution,

And the said Frank Hansford Johnson, a minor, appearing
50 in court by his said guardian Frank S. Johnson, and by his attorneys, Messrs. Chickering, Thomas & Gregory, and J. W. Dorsey, Esq., and in open court consenting to the settlement of said final account and approving the same as filed and consenting to the said petitions for distribution as made by said George E. Williams, executor, aforesaid and said Thomas H. Williams, Jr.,

And it appearing to the satisfaction of the court that due notice of the hearing of said petition of Thomas H. Williams, Jr., was given, as required by law, and the said day and hour having set and appointed by the court for the hearing thereof, and the said petitions and all of said matters coming on regularly to be heard on said 26th day of December, 1896, at the hour of 2 o'clock P. M.

This court then proceeded to the hearing of said final account of said George E. Williams, and his report and petition for distribution, and the final hearing of the petition for distribution of said Thomas H. Williams, Jr., and thereupon the said matters were continued from time to time until the 5th day of January, 1897; and now at this time it appearing to the satisfaction of this court that said Thomas H. Williams died testate in the City and County of San Francisco, State of California on the day of February, 1886, leaving him surviving, Mary Bryant Johnson (born Williams), a daughter, Thomas H. Williams, Jr., a son, petitioner herein, Sherrod Wil-

liams, a son, Percy Williams, a son, and Bryant Williams, a son, and that on April 6th, 1886, George E. Williams, was by order of this court duly appointed executor of said last will and testament of the said testator, and did on said date duly qualify as such executor.

And it also appearing that said executor immediately upon
51 his appointment did cause due and legal notice to be published to the creditors of and claimants against said deceased to present their claims within ten months from the first publication of said notice and that the fact of such publication has been duly established by decree of this court duly given, made and entered herein; and it appearing that more than ten months have elapsed since the issuance of letters testamentary herein and since the qualification of said executor and since the first publication of said notice to said creditors.

And it appearing that all bequests and legacies contained in the last will of said testator have been fully paid and satisfied;

And it appearing to the satisfaction of the court that Thomas H. Williams, Jr., petitioner herein, is the only living child of said decedent, and that said Thomas H. Williams, Jr., is over the age of twenty one years.

And it appearing to the satisfaction of the court that Mary Bryant Williams, named in said last will and testament of said decedent, was a daughter of said testator, and that during her lifetime she was married to Frank S. Johnson, and that thereafter and subsequent to the admission to probate of said last will and testament of said decedent, the said Mary Bryant Johnson, (born Williams), departed this life, leaving as her sole surviving issue, Frank Hansford Johnson, hereinbefore mentioned, a minor,

And it appearing that Frank S. Johnson, is the duly appointed, acting and qualified guardian of the person and estate of said Frank Hansford Johnson, a minor, as aforesaid, and under the age of fourteen years.

52 And it appearing that Percy Williams, one of the legatees named in said last will and testament, has since the admission to probate of said last will, departed this life, without leaving issue, but subsequent to the payment to him of the legacy mentioned in paragraph second of Item 4, of the last will and testament of the testator.

And it appearing that Bryant Williams named in said last will and testament, and one of the sons of said testator, subsequent to the publication and admission to probate of said will, departed this life without leaving issue, and that Sherrod Williams, one of the sons of said testator, has since the publication and admission to probate of said last will and testament, departed this life without leaving issue, and that all of the parties interested in the said estate and under said last will and testament, are now present in court, in person or by attorney.

And it appearing that Thomas H. Williams, Jr., and said Frank Hansford Johnson, are the residuary and sole devisees and legatees of said testator, and that said testator by Item 12 of his said last will and testament provided as follows: "In the event my brother

executes "this will, I direct that the court having jurisdiction make " him a fair and liberal allowance for all services without reference " to statutory or other fee."

And it further appearing that George E. Williams, the executor named in said last will and testament, is the brother of said decedent, and that at the time of the admission of said will to probate, said George E. Williams did qualify as the executor thereof, and has ever since the 6th day of April, 1886, and continuously, acted as
53 the duly qualified and appointed executor of the last will and testament of said decedent.

Now, therefore, upon the application of said George E. Williams, executor, as aforesaid, and all of said parties in open court consenting thereto, and it appearing that said executor has rendered great, extraordinary and valuable services to said estate and has performed all the labors thereof, and in view of the provision of said will, hereinbefore recited,

It is hereby ordered that said George E. Williams be and he hereby is allowed the sum of one hundred thousand dollars as compensation for his services as the executor of said last will and testament, in addition to all sums to him heretofore paid on account of said services.

And whereas, it appears from the account on file herein, that there is no money on hand with which to pay said sum of one hundred thousand dollars, hereby allowed, or any part thereof, and

Whereas a report, inventory and appraisement, under oath, of all the property of said estate was filed in this court on the 15th day of December, 1896, by appraisers heretofore duly appointed by this court.

And it appearing that Frank S. Johnson has been duly authorized by the Superior Court of the County of Marin, State of California, the court having jurisdiction of the person and estate of said Frank Hansford Johnson, the said minor, to consent to all matters and things recited in this decree,

And it appearing by said inventory and appraisement that the following parcels of property situate, lying and being in the county of San Joaquin, State of California, and marked, "A," "B,"
54 and "C," have been by said appraisers appraised in the aggregate at one hundred thousand dollars, and that said George E. Williams, in open court requesting that said parcels of property b distributed to Thomas H. Williams, Jr., in fee charged specifically with a lien for the payment to said George E. Williams of the said sum of one hundred thousand dollars, so allowed him as compensation, payable to him upon demand by said Thomas H. Williams, Jr.

And the said Thomas H. Williams, Jr., and the said Frank Hansford Johnson, by his guardian, in open court, consenting thereto, and the said George E. Williams in open court releasing his estate from all claims and demands, and filing his release and receipt to that effect, it is hereby ordered, that the following described lands, to wit,

A.

Beginning on Williams Ranch on Union Island at a point designated as "20 A." on the center of the "Kidd Levee," said point

being due west 10. feet from a monument set on the easterly slope of said levee and being also 1962.7 feet north, and 332.0 feet west of the monument at the North East corner of the lands of David Bixler, as said corner was established by Julius H. Smith, in 1889, on the west base of the "Kidd Levee," thence from said point of beginning as so fixed and established, due West 40.4 feet to the westerly side of said "Kidd Levee" thence northerly parallel with and distant 40.0 feet westerly from the center line of said "Kidd Levee"; (as said center line is defined by the following courses and distances from the point of beginning; North 8 degrees 13' East 923.1 feet, North 2 degrees 38' East 180. feet, North 2 degrees 19' West 300. feet, North 4 degrees 41' East 180. feet, North 19 degrees 32' East 210 feet, North 35 degrees 15' East 180. feet North 44 degrees 09' East 190. feet, North 35 degrees 14' East 920. feet, North 25 degrees 53' East, 14.40 feet North 28 degrees 31' East 422. feet to a point designated as "29 A." on the North line of the tract herein described said point being due west 10. feet from a monument on said North line) thence due East 45.5 feet to said point "29 A.," thence continuing due east 6620.8 feet to a point designated as "107 A" on the center line of the "Wing Levee" said point being due East 10. feet from a monument on said line, thence continuing due East 50. feet more or less to the East base of said Levee, thence Southerly parallel with and distant 50. feet more or less Easterly from the center line of said "Wing Levee" to an East and West line passing through the point of beginning said East and West line being established by a monument on the Westerly slope of said "Wing Levee," thence due West 9130.0 feet more or less to the point of beginning, containing 856 acres. All courses through, magnetic variation 17 degrees 30' East, situate in the County of San Joaquin, State of California.

"B"

Beginning at the monument marking the Northeast corner of the lands of David Bixler on Union Island on the west base of the Kidd Levee, as said corner was established by Julius H. Smith in 1889, thence along the west base of said Kidd Levee and distant 40 feet westerly from and parallel to the center line of said Levee, as said center line is defined by the following courses and distances; (North 32 degrees 12' East 30.35 feet to a point on the center of said Levee, thence along center line of said levee; north 3 degrees 41' East 200 feet, North 13 degrees 41' West 100 feet, North 21 degrees 13' west 630 feet, North 15 degrees 25' west 180 feet, North 12 degrees 31 minutes west 490 feet, North 0 degrees 37' west 90 feet, North 3 degrees 16' East 313.9 feet to a point designated as "20 A" on the North line of the tract herein described, said point being due west 10 feet from a monument on said line), thence due east 40.4 feet to said point "20 A," thence leaving said levee and running due East 9080.2 feet to a point designated as "121 A" on the center of the Wing Levee, said point being due east 10 feet from a monument on said line, thence continuing due east 50 Feet more or less to the east base of said "Wing Levee" thence southerly parallel with and

distant 50 feet more or less Easterly from the center line of said "Wing Levee" (the following courses and distances from said point "121 A" measured along the center of said levee; south 16 degrees 36′ east 225.1 feet, thence south 9 degrees 04′ west 1290 feet, thence south 39 degrees 02′ west 100 feet, thence south 65 degrees 23′ west 320 feet, thence south 32 degrees 55′ west 260 feet, thence South 62 degrees 32′ west 470 feet, thence South 32 degrees 41′ west 110. feet, thence South 13 degrees 24′ west 320 feet, thence South 4 degrees 35′ East 230 feet, thence South 25 degrees 19′ west 170. feet, thence South 45 degrees 12′ west 550 feet, thence South 18 degrees 31′ west 380. feet, thence South 22 degrees 46′ west 410. feet, thence South 9 degrees 49′ east 260. feet, thence south 20 degrees 03′ west 140. feet, thence south 41 degrees 45 minutes west 250 feet, thence South 62 degrees 58 minutes west 240 feet, thence south 7 degrees 05′ west 360. feet, thence South 23 degrees 44′ east 140. feet, thence South 35 degrees 18′ east 170. feet, thence South 22 degrees 29′ east 280. feet,
57 thence South 37 degrees 53′ east 210. feet to a point designated as "143,") thence to a post on the East base of said "Wing Levee," which post bears South 67 degrees 47′ east 104.4 feet from said point "143" said post being at the North west corner of the so called "outside lands" owned by David Bixler, as said corner was established by Julius H. Smith in 1889, thence along the easterly and southerly sides of the "Wing Levee," on the division line between the lands of the Williams Estate, and David Bixler, the following courses and distances as established by said Smith; South 5 degrees 27′ West 7.14 chains, South 33 degrees 29 minutes West 9.97 chains, South 9 degrees 27′ west 5.58 chains. South 39 degrees 33′ west 6.14 chains, South 64 degrees 01′ west 7.90 chains, North 56 degrees 03′ west 10.00 chains; North 78 degrees 40′ west 4.89 chains to the "Initial Point" of said Smith Survey, thence continuing along the said Smith Survey and along the Kidd Levee North 61 degrees 20′ west 9.00 chains, North 70 degrees 38′ west 5.91 chains, North 38 degrees 36′ west 7.10 chains, South 47 degrees 03′ west 9.30 chains, South 58 degrees 50 minutes West 4.10 chains, South 84 degrees 45 minutes west 4.78 chains, North 89 degrees 02′ west 9.11 chains, North 88 degrees 41′ west 7.76 chains, south 40 degrees 53′ west 99.9 feet to a monument at the South East corner of the "Undine Townsite Tract," thence along the Easterly boundary of said last mentioned tract North 2 degrees 39 minutes East 17.01.8 feet to the North East corner post of the "house orchard," thence along the Northerly boundary of the said Townsite Tract North 87 degrees 31′ west 11.85.9 feet to a monument designating the North West corner of the said Townsite Tract, and
58 being on the west side of the "Kidd Levee," thence along said West side of said Levee North 38 degrees 18′ west 1178.1 feet, North 7 degrees 56′ east 2119.9 feet to the point of beginning, containing 1150 acres. All courses true, magnetic variation 17 degrees 30′ East, situate in the County of San Joaquin, State of California.

C.

Orchard.

Commencing at a point on Williams Ranch on Union Island, designated as "43" on the center line of said "Kidd Levee," where said line would be intersected by the prolongation of the fence on the Southerly side of the Orchard in the North Westerly corner of the "Kidd Ranch" said point being also North 9351.0 feet and East 2109.0 feet of the monument at the Northeast corner of the lands of David Bixler as said point was established by Julius H. Smith in 1889 on the west base of the "Kidd Levee," running thence North 81 degrees 53′ East 168.8 feet along said Orchard fence to an angle in same, thence North 78 degrees 23′ East 497.0 feet along orchard fence to the fence post at the South East corner of said orchard, thence along the fence marking the Easterly boundary of said orchard North 22 degrees 05′ West 3558 feet to a point on the center of "Middle River Levee," thence along the same course North 22 degrees 05′ East 100 feet more or less to the Southerly bank of "Middle River," thence descending along the Southerly bank of said "Middle River" in a westerly direction to the intersection of said Southerly bank with a line parallel with and distant 40.0 feet westerly from the center line of the "Kid Levee" produced; thence southerly along the last mentioned parallel line to a point south 81 degrees 53 minutes West 42.2 feet from the point of beginning, thence North 81 degrees 53′ East 42.2 feet to the point of beginning. Containing 166 acres. All courses true, magnetic variation 17 degrees 30′ east. Situate in the County of San Joaquin, State of California: be and they hereby are distributed to Thomas H. Williams, Jr., in fee, and the same by this decree of distribution is hereby specifically and directly charged with the payment to George E. Williams, by said Thomas H. Williams, Jr., of the sum of one hundred thousand dollars, lawful money of the United States, upon the demand therefor by said George E. Williams.

59

And it appearing to the court that there are no other debts of said estate, save and except the sum of seventy-five thousand dollars, owing to the Security Savings Bank of the City and County of San Francisco, and said debt having been arranged, as hereinafter provided and decreed, and that there are no costs of administration save and except such as have been provided for, and that all taxes that have been attached to or accrued against said estate have been fully paid and discharged.

And it also appearing that said estate has been fully, fairly and justly administered, and that the said indebtedness of said estate, has been fully arranged for, as hereinafter directed, that said estate is now ready for distribution and in proper condition to be closed,

Now, therefore, it is hereby ordered, adjudged and decreed, that the said final account of said executor be and the same hereby is in all respects allowed, settled, approved and confirmed, and by consent of all parties, all the acts and doings of said George E. Williams,

as such executor, from the time of his appointment to this
60 date, are hereby confirmed and approved.

And it appearing from the petition of said George E. Williams, and the petition of said Thomas H. Williams, Jr., and from the will of said deceased, testator, that it was therein provided that the court having jurisdiction of the matters pertaining to said will should appoint appraisers of the estate, upon which appraisement the children of said testator should be heard, and that said appraisers should appraise and make written returns of description and value and that the court should hear all objections to the returns of said appraisers and finally settle the matter, and that thereupon the children named in said will, then living, should have the right to select certain life interests in the property of said decedent, which should be distributed to said George E. Williams in trust for the benefit of such child or children, and thereafter as provided in said will.

And it appearing that no application for the appointment of appraisers was made by any one of the deceased children of said testator during their lives, and that no selection was made by them or either of them, of the life interest to which they were entitled.

And it appearing that Thomas H. Williams, Jr., is the sole surviving child of said testator, named in said will, and that on the 5th day of August, 1896, said Thomas H. Williams, Jr., did duly present to this court a petition setting forth said facts, and did pray the court that appraisers be appointed in accordance with the terms of said will, and did ask that said Frank Hansford Johnson and his guardian, Frank S. Johnson, be notified of said application
61 and show cause if any they have why appraisers should not be appointed, as by him prayed for,

And it appearing that on the 12th day of August, 1896, the Court then and there having jurisdiction of the said matter and of said persons, and the said George E. Williams, the executor of this estate, as aforesaid, appearing in open court in his own proper person, and the said Thomas H. Williams, Jr., and the said Frank Hansford Johnson, the said minor, and his guardian, Frank S. Johnson, at said time appearing in court, by and through their attorneys, it was ordered by this court, that F. C. Ross, Thomas Archer and John Herd, Jr., be and they were thereupon duly appointed appraisers of all the property of said estate of said decedent, and were ordered to make due appraisement of said estate and the property thereof and thereto belonging, and to make written returns under oath to this court of the descriptions and value thereof,

And it appearing that thereafter and theretofore said appraisers did duly qualify, and have filed in this court written returns of the descriptions and value of said estate under oath, and that in making said returns they did consult with said George E. Williams, and said Thomas H. Williams, Jr., and the said Frank Hansford Johnson by and through his said guardian Frank S. Johnson, as aforesaid, and did return the property of said estate and appraise the same at the sum of one million four hundred and sixty five thousand eight hundred and 08/100 ($1,465.800.08) dollars.

And it appearing that thereupon the said Thomas H. Williams, Jr., did by his petition duly filed herein make selection of certain of the properties belonging to said estate which should be distributed to said George E. Williams, for the benefit of him, Thomas
62 H. Williams, Jr., during his life, and thereafter for distribution as provided in said will, and that thereafter, the said George E. Williams, executor of said last will and testament, and said Thomas H. Williams, Jr., being both present in open court, the latter by and through his attorney, and the said Frank Hansford Johnson being present in court by and through his duly appointed qualified and acting and authorized guardian, Frank S. Johnson, and being also represented in open court at said time by attorneys, and all of said parties consenting thereto, the said, and none of said parties offering any objections to said written returns and appraisement of said appraisers, but on the contrary, in open court consenting to said returns and said appraisements.

It is hereby ordered that said written returns and appraisements of the property belonging to said estate, be and the same hereby are approved.

It is further ordered and adjudged that the selections of said Thomas H. Williams, Jr., of the property to be distributed to said George E. Williams, as trustee for the benefit of said Thomas H. Williams, Jr., during his life, as set forth in his petition on file herein, there being no objection thereto, be and the same are hereby approved.

And it appearing that said estate of said testator consists of real property, as described in the final account and report of said George E. Williams, and of the personal property contained in Schedule "D," attached to said final account.

And it appearing from the will of said decedent and from the various petitions and statements hereinbefore recited and from the statements of the parties in open court, that said Thomas H. Williams, Jr., is entitled to select one third of the estate of said decedent now on hand, in property for the benefit of his life, as herein-
63 before stated and found.

And it appearing that all of said parties have agreed in detail upon all of the property which shall be set apart and distributed to George E. Williams, for the benefit of said Thomas H. Williams, Jr., during his life, and have also agreed upon the property which shall be distributed to said Thomas H. Williams, Jr., in fee, and to the said Frank Hansford Johnson in fee.

Now therefore, upon the consent of all the parties hereto, in open court, it is hereby ordered, adjudged and decreed that there shall be distributed to said Thomas H. Williams, Jr., absolutely and in fee, the following described, pieces and parcels of land, to wit:

No. 15. Beginning at a point on Grand Island where the North westerly bank of the Sacramento River is intersected by a line parallel to and distant 100 feet, southwesterly from the line between Swamp and Overflow land Survey Numbers 321 and 510 as such line is fixed and established by a line ditch; run thence along said parallel line North 51 degrees 42′ West 1.50 chains more or less, to

an artificial stone monument planted on the inside slope of levee; thence continuing on the same line North 51 degrees 42′ West 38.60 chs. more or less to the center of a main drainage canal; said parallel line being fixed and established by an artificial stone monument on the southeasterly bank of said canal; run thence from the last mentioned point along center of said canal N. 34 degrees 16′ E. 100 feet and N. 46 degrees 59′ E. 15.70 chs; thence leaving canal run due West 65.12 chs. to the center line of another main drainage
64 canal (said east and west line being fixed and established by artificial stone monuments on banks of said canals); thence S. O. 09′ W. 30.96 chs. along the center line of last mentioned canal; thence leaving last mentioned canal run S. 89 degrees 57′ E. 3990 chs. to the center line of the first mentioned canal; the last mentioned line being fixed and established by artificial stone monuments planted on banks of said canals, thence S. 34 degrees 16′ W. 23.91 chs. along center of said canal to the center line produced of a line ditch; thence S. 52 degrees 04′ E. 20.48 chs. along the center line of said ditch to its intersection with the center line of another ditch; thence along the center line of said last mentioned ditch N. 31 degrees 44′ E. 38.59 chs. to an iron gratebar heretofore planted in the ground as a monument; thence S. 51 degrees 26′ E. 19.70 chs. to an old survey post planted on the inside slope of the levee on the Northwesterly bank of the Sacramento River; thence continuing on the same course S. 51 degrees 26′ E. 1.40 chs. more or less, to said Northwesterly bank of said river; thence meandering said Northwesterly bank up stream about 8.32 chs. to the point of beginning. Containing 266.95 acres. Run by true meridian, Mag. Var. 17 degrees 04′ E. in Sacramento County, State of California.

No. 17. Commencing at the monument on Union Island marking the Northeast corner of the lands of David Bixler as said corner was established by Julius H. Smith in 1889 on the West base of the "Kidd Levee" run thence due west along the division line between the lands of said David Bixler and the Williams' estate 5587.7 feet to a monument, thence leaving said division line and run due north 8696.2 feet to a monument, thence due East 7240.8 more or less to a point on the West side of the "Kidd Levee" and on a line parallel
65 to and distant 40.0 feet westerly from said "Kidd Levee," said east and west line being fixed and established by a monument on the west slope of said "Kidd Levee" and 10. feet west from the center thereof, thence southerly along said line parallel to and 40 feet westerly from said "Kidd Levee," to the point of beginning. Containing 1226.72 acres. All courses true, magnetic variation 17 degrees 30′ East. All in the County of San Joaquin, State of California.

No. 19. Beginning at a post on the East base of the "Wing Levee," on Union Island, said post being set on a line running East and West, and which line is due North 3212.6 feet from the Northwest corner of the so-called "Outside Lands" of David Bixler, as said corner was established by Julius H. Smith in 1889, running thence northerly along the East base of said "Wing Levee" to its intersection with the westerly bank of "Middle River," thence Southerly

along the said Westerly bank of "Middle River" to a point which is due East of the point of beginning, thence due West to the said point of beginning, containing 108.25 acres, in San Joaquin County, State of California.

No. 20. Beginning at a point on Grand Island on the North bank of the Eastern branch of the Sacramento River, commonly known as "Old River," where said bank is intersected by the Eastern edge of the Cross Canal connecting said Old River with the western branch of said Sacramento River, commonly known as Steamboat Slough (in the corner formed by such intersection is a large pile driven into said bank and serving as a monument), and running thence Northerly along the East edge of said Canal to said Steamboat Slough; thence meandering said Steamboat Slough along its South
66 bank, up stream, in a general Northeasterly direction to a point where the South bank of said Steamboat Slough is intersected by a line parallel with, and twenty-seven chains and ninety-eight links (27.98 ch.) West of the section line between sections fourteen and fifteen, twenty-two and twenty-three, in Township four North, Range three East (Sec-. 14 and 15, 22 and 23 in T. 4., N. R. 3 *R.*), the location of which parallel line is fixed and established by the center of an artificial stone monument indicating a recognized point thereon, planted at the Southern base of the levee situate on said Steamboat Slough; and running thence South along such parallel line, as so fixed and established, one hundred and twenty-seven chains and forty links (127.40 ch.), more or less, to an artificial stone monument on the line, planted at the North base of the levee situate on the North bank of said Old River, and thence continuing on the same course to said Old River; thence meandering said Old River along its North bank, down stream, in a general Northwesterly direction to the point of beginning; containing eight hundred and sixty-six and 50/100 (866.50) acres. Run up true meridian. Magnetic variation, 17 degrees 04′ East. Excepting therefrom, however, that small parcel of land containing one-quarter of an acre, whereon is situate the Pumping Plant of Reclamation District No. 3 and bounded and described as follows:

Commencing at the center of a guy post connected by guy rods with the Smokestack of said Pumping Plant, and bearing from the aforesaid pile on the North bank of said Old River, North 79 degrees 46′ East, distant therefrom two chains and thirty-one links; and running thence North 6 degrees 22′ East, two chains and eighteen links to center of a second guy post; thence North 75 degrees 41′
67 West, one chain and thirty-five links to center of a third guy post, thence South 3 degrees 21′ West, one chain and eighty-two links to center of a fourth guy post; and thence South 59 degrees 45′ East, one chain and thirty-five links to the point of beginning; containing one-quarter of an acre. Run by true meridian. Magnetic variation as aforesaid. All in the County of Sacramento, State of California.

And that there shall be and there hereby is distributed to said Frank Hansford Johnson, absolutely and in fee, the following described pieces and parcels of land, to wit:

Undine Townsite.

No. 7. Beginning at a red wood post 4 inches square planted on the West base of the Kidd Ranch Levee Union Island and on the South base of the Levee on which the Tracey Crossing Road is situated and run thence North 35 degrees 18′ West 710.2 feet, along the West base of the Kidd Ranch Levee to a point on the line of the Northerly fence enclosing the house orchard, produced Westerly, thence along last mentioned line South 87 degrees 31′ East 1185.9 feet to the North East corner post of said orchard fence, thence along the Easterly fence line of said orchard and the prolongation thereof South 2 degrees 39′ West 1701.8 feet to a monument on the Southerly base of the Kidd Levee, said point being in the line dividing the lands of the Williams Estate from the lands of David Bixler, as said line was surveyed by Julius H. Smith in 1889, thence along said last mentioned line as run by said Smith South 40 degrees 53′ West 705.3 feet to a point on line with the South line of the "Pasture Field," thence along said South line due West 1589.3 feet, thence North 15 degrees 22′ West 1221 feet along the Westerly side
68 of "Pasture Field" to the South base of the Levee on which is situated the Tracy Crossing Road, thence following along the Southerly base of said Levee, being also the Northerly side of the "Pasture Field" the following courses and distances North 56 degrees 18′ East 1093.9 feet, South 85 degrees 55′ East 528 feet, South 79 degrees 42′ East 243.5 feet to the point of beginning. The lines around the "Pasture Field" being the same as those run by said Smith. Containing 94.85 acres. All courses true, magnetic variation 17 degrees 30′ East. All in San Joaquin County, State of California.

No. 8. Beginning at a point on Williams Ranch on Union Island on the West side of the "Kidd Levee," said point being on a line parallel to and distant 40. feet Westerly from centre of "Kidd Levee" and being also on an East and West line passing through a point due North 8696.2 feet from a monument at the North East corner of the lands of David Bixler on the West base of the "Kidd Levee," as such corner was established by Julius H. Smith in 1889, said East and West line being fixed and established on the East by a monument on the West slope of said "Kidd Levee" from this point of beginning running thence Northerly along said line parallel with and distant 40. feet Westerly from the center of "Kidd Levee" to the intersection of said parallel line produced with the Southerly bank of "Middle River," thence meandering down stream in a general westerly direction along said Southerly bank of "Middle River" to its intersection with the division line between the land of David Bixler and the Williams Estate as established by Julius H. Smith in 1889 on the West side of the "Cross Levee," thence Southerly along said division line to a point on an East and West line passing
69 through the point of beginning, said East and West line being established on the West by a monument on the East slope of the "Cross Levee," thence due East along said East and West line 15000.0 feet more or less to the point of beginning, containing 1546.07 acres.

Saving and excepting therefrom a certain tract of land situated on and adjacent to the "Cross Levee" to be set apart for a Pumping Station and more particularly described as follows:

Beginning at a point on the center of the "Cross Levee" said point being on an East and West line passing through a point due North 9880.3 feet from the monument at the North East corner of the lands of David Bixler on the West base of the "Kidd Levee" as such corner was established by Julius H. Smith in 1889, said point of beginning being further fixed and established by a monument bearing North 77 degrees 30′ East distant 10. feet from it, thence from said point of beginning North 77 degrees 30′ East 280. feet to a monument, thence North 12 degrees 30′ West 240 feet to a monument, thence South 77 degrees 30′ West 270 feet to a monument on the East slope of the "Cross Levee," thence continuing on the same course South 77 degrees 30′ West 60. feet more or less to the division line between the land of David Bixler and the Williams Estate as established by Julius H. Smith in 1889 on the West side of the "Cross Levee," thence Southerly along said division line 240 feet more or less to a point South 77 degrees 30′ West 50. feet more or less from the point of beginning, thence North 77 degrees 30′ East 50 feet more or less to the point of beginning. Containing 1.80 acres more or less. All courses true, magnetic variation 17
70 degrees 30′ East. Containing in all 1544.27 acres, in San Joaquin County, State of California.

No. 9. Beginning at a point on Williams Ranch on Union Island designated as "29 A" on the center of the "Kidd Levee" said point being due West 10. feet from a monument set on the Easterly slope of said Levee and being also 6436.6 feet North and 1481.1 feet East of the monument at the North East corner of the lands of David Bixler as said corner was established by Julius H. Smith in 1889 on the West base of the "Kidd Levee"; thence from said point of beginning as so fixed and established, due West 45.5 feet to the Westerly side of said "Kidd Levee," thence Northerly, parallel with and distant 40.0 feet Westerly from the center line of said "Kidd Levee"; (as said centre line is defined by the following courses and distances from the point of beginning. North 28 degrees 31′ East 98 feet, North 37 degrees 00′ East 170. feet, North 54 degrees 44′ East 300 feet, North 30 degrees 02′ East 60 feet North 0 degrees 54′ East 100 feet, North 8 degrees 03′ West 300. feet, North 15 degrees 54′ West 340 feet, North 12 degrees 03′ West 280. feet, North 5 degrees 24′ West 350 feet, North 1 degree 14′ East 470. feet: North 13 degrees 22′ East 200 Feet, North 34 degrees 11′ East 260 feet, North 50 degrees 03′ East 280. feet, North 10. degrees 35′ East 63. feet to a point designated as "43" on the Northerly line of the tract herein described and being also on the line of the orchard fence produced;) thence North 81 degrees 53′ East 42.2 feet to said point "43," thence continuing North 81 degrees 53′ East 168.8 feet along orchard fence to an angle in same, thence North 78 degrees 23′ East 497. feet along orchard fence to the fence post at the South East corner of said orchard, thence South 89 degrees 14′ East 4285.2
71 feet to a point designated as "101 A" on the centre of the Middle River Levee, said point being South 89 degrees 14′

East 10. feet, from a monument on said line, thence continuing South 89 degrees 14′ East 100. feet more or less to the West bank of "Middle River," thence Southerly along the West bank of "Middle River" to its intersection with the Easterly base of the "Wing Levee," thence Southerly parallel with and distant 50. feet more or less Easterly from the centre line of said "Wing Levee" to an East and West line passing through the point of beginning, said East and West line being established by a monument on the Westerly slope of said "Wing Levee"; thence due West 6670. feet more or less to the point of beginning. Containing 417 acres. All courses true, magnetic variation 17 degrees 30′ East. All in San Joaquin County State of California.

No. 10. Commencing at or very nearly at the South West corner of the South East quarter of Section 1 T. 4 N. R. 3 E. as such point is fixed and established by the centre of an artificial stone monument, said point being also due South 40.00 chs. and due East 30.456 chs. from an artificial stone monument on the East side of the top of the levee on the East bank of Steamboat Slough where said levee is intersected by the East and West quarter section line which passes through Sec. 1 T. 4 N. R. 3 E. as said line is fixed and established by a line ditch and the center of a main drainage canal; run thence from said point of beginning East 80 chs. on or very nearly on the section line between sections 1 and 12 in T. 4 N. R. 3 E. and the East and West quarter section line of Sec. 7 in T. 4 N. R. 4 E. to a point which is at or very nearly at the South West corner of North West quarter of section 8 T. 4 N. R. 4 E. as such last mentioned point is fixed and established by the center of an artificial stone monument; thence South 33.125 chs. on or very nearly on the section line between Sections 7 and 8, T. 4. N. R. 4 E. to the center of an artificial stone monument; thence due West 80 chs. to the centre of another stone monument on or very nearly on the North and South quarter section line of Section 12 T. 4 N. R. 3 E., thence along said quarter section line North 33.125 chs. to point of beginning. Containing 265 acres. Run by true meridi*na*. Mag. Var. 17 degrees 04′ E. on Grand Island in Sacramento County, State of California.

72

Beginning at a point on Grand Island on the East bank of the Western branch of the Sacramento River, commonly known as "Steamboat Slough," where said bank is intersected by the East and West quarter-section line of section twenty-five in Township five North, Range three East (Sec. 25 in T. 5 N. R. 3 E.), as the location of said quarter-section line is fixed and established by an artificial stone monument planted on the East edge of the top of the Steamboat Slough Levee, the center point of which monument is on the South boundary of the tract of land belonging to Mary H. Jarboe, and is a recognized point on said quarter-section line, and running from said point of beginning South eighty-nine degrees and forty-four minutes East, two chains, (S. 89 degrees 44′ E. 2 ch.) to the center point of said monument; thence continuing on the same course, eight chains and ninety-three links (S. 89 degrees 44′ E. 8.93 ch.) to the center point of the West end of a line ditch four feet

wide, thence continuing on the same course, following the center line of said ditch, thirty-eight chains and ninety-two links (S.
73 89 degrees 44′ E. 38.92 ch.) to the point where the center of said ditch joins the center of a Drainage Canal, forty links (40 l.) wide, one branch of which runs thence South and the other East, and thence still continuing on the same course, following the center line of the East Branch of said Canal, fifty-four chains and seventy links (S. 89 degrees 44′ E. 54.70 ch.) to the intersection of such center line (at a total distance of one hundred and two chains and fifty-five links (102.55 ch.) from the center point of said monument) with the center line of another drainage canal, forty links (40. l) wide, which runs North from such intersection; thence along the center line of said last mentioned Canal, North eleven minutes, East forty chains (N. 0 degrees 11′ E. 40.00 ch.); thence leaving said canal and running South eighty-nine degrees and forty-nine minutes, East one hundred and twenty chains (S. 89 degrees 49′ E. 120.00 ch.) to a point marked by an iron pipe heretofore planted there as a monument, and which point is recognized as the center of section twenty-eight in Township five North, Range four East (Sec. 28 in T. 5 N., R. 4 E.); thence South twenty-one degrees and forty-one minutes East, five chains and forty-nine links (S. 21 degrees 41′ E. 5.49 ch.) to a post four inches square, heretofore planted there as a monument; thence South 89 degrees and fifty-seven minutes East, seventy-three chains, and sixty-six links (S. 89 degrees 57′ E. 73.66 ch.) to a point four links East of a stone monument; thence South nineteen minutes West, forty three chains (S. 0 degrees 19′ W. 43.00 ch.) to the center of the main Drainage Canal, forty links (40 l.) wide, connecting with Beaver Lake; thence along the center line of said Canal, South eighty-two degrees and twenty-two minutes West, four chains and fifty-nine and one-half links (S. 82 degrees
22′ W. 4.595 ch.) to the Northwest corner of Swamp Land
74 Survey, No. 308; thence along the center line of said Canal, North seventy degrees and three minutes West, thirty-one chains and twenty-seven links (N. 70 degrees 03′ W. 31.27 ch.) to the Northwest corner of Swamp Land Survey No. 309; thence along the center line of said Canal and extending into said Beaver Lake, North eighty-two degrees and thirty minutes West, fifty-three chains and fifteen links (N. 82 degrees 30′ W. 53.15 ch.) to the Northwest corner of Swamp Land Survey No. 310; thence South sixty-one degrees and thirty six minutes west eighteen chains and thirteen links (S. 61 degrees 36′ W. 18.13 ch.) to a point on the South bank of said Beaver Lake; thence North five degrees and seventeen minutes West, forty-seven links (N. 5 degrees 17′ W. 0.47 ch.) to an iron pipe heretofore planted in the ground, and marking the Northeast corner of the tract of land, part of Swamp Land Survey No. 311, now occupied by William L. Jones; thence along the Southeast bank of said Beaver Lake, the following courses and distances, to-wit:

South eighty degrees and two minutes West, eight chains (S. 80 degrees 02′ W. 8.00 ch.); South sixty-four degrees 33′ W. 4.00 ch.); South forty-three degrees and seventeen minutes West, fifteen chains (S. 43 degrees 17′ W. 15.00 ch.); South fifty-three degrees and

thirty-two minutes West, nine chains (S. 53 degrees 32 W. 9.00 ch.); South thirty-nine degrees and five minutes West, two chains and fifty links (S. 39 degrees 05′ W. 2.50 ch.); South fourteen degrees and fifty-five minutes West, six chains and forty-three links (S. 14 degrees 55′ W. 6.43 ch.) to an iron pipe marking a corner common to the said tract of land so occupied by said William L. Jones, and the tract of land also part of said Swamp Land Survey No.
75 311, occupied by William Kesner; thence continuing along the East bank of said Beaver Lake, South eight degrees and thirty-eight minutes West, seven chains (S. 8 degrees 38′ W. 7.00 ch.); South seventeen degrees and fifteen minutes West, eight chains and fifty links (S. 17 degrees 15′ W. 8.50 ch.); South thirty-six degrees and thirty-three minutes West; two chains (S. 36 degrees 33′ W. 2.00 ch.); South twenty-five degrees and thirty-six minutes West two chains and sixty-eight links (S. 25 degrees 36′ W. 2.68 ch.); and South seventeen degrees and four minutes West, thirteen and seven tenths links (S. 17 degrees 04′ W. 0.137 ch.) to the North bank of the Drainage Canal, forty links wide, running from said Lake to the Hyde Pump; thence along the North bank of said Canal South Seventy-five and two minutes East twenty-seven chains and twenty-seven links (S. 75 degrees 02′ E. 27.27 ch.) to a post on the levee on the Eastern branch of the Sacramento River, commonly known as "Old River," and thence on the same course thirty-three links, more or less, to Old River; thence meandering said Old River on its Northwesterly bank, down stream six chains and twenty-one links, a little more or less to a point on the North line of the tract of land heretofore belonging to Domino Cardoza and now to Joseph F. Miller; thence leaving the said river and running North seventy-five degrees and Two minutes West thirty-eight chains and forty links, more or less (E. 75 degrees 02′ W. 36.40 ch. more or less), along the North line of the said Cardoza or Miller Tract to the center of the Main Drainage Canal; forty links wide, which runs North and South; thence in the direction of the center line of said Canal, North forty-seven minutes West, two chains and seventy links (N. 0 degrees 47′ W. 2.70 ch.) to an iron pipe in the center of Beaver Slough;
76 thence along the northwest bank of the Canal connecting the main North and South Canal with Beaver Lake; North seventy-one degrees and forty-two minutes East, six chains and forty-five links (N. 71 degrees 42′ E. 6.45 ch.) to the West bank of Beaver Lake; thence meandering said West bank, the following courses and distances; North nineteen degrees and thirty-seven minutes East, eight chains (N. 19 degrees 37′ E. 8.00 ch.); North fourteen degrees and thirty-eight minutes East, sixteen chains (N. 14 degrees 38′ E. 16.00 ch.); North twelve degrees and fifty-eight minutes West, two chains (N. 12 degrees 58′ W. 2.00 ch.) to the intersection of the West bank of Beaver Lake with the South bank of a crooked slough running into the Lake, the point of intersection being designated by an artificial stone monument; thence meandering along the South bank of said Slough, the following courses and distances; North fifty-four degrees and two minutes West, five chains (N. 54 degrees 02′ W. 5.00 ch.); South eighty-four degrees and fifty-four minutes

West, one chain and twenty links (S. 84 degrees 54′ W. 1.20 ch.); South fifty-seven minutes West, five chains (S. 0 degrees 57′ W. 5.00 ch.); South thirty degrees and thirty minutes West, three chains (S. 30 degrees 30′ W. 3.00 ch.); South fifty-three degrees and forty-five minutes West, five chains (S. 53 degrees 45′ W. 5.00 ch.) South forty degrees and fifteen minutes West, four chains and twenty-links (S. 40 degrees 15′ W. 4.20 ch.); North eighty-three degrees and forty-five minutes West, two chains and fifty links (N. 83 degrees 45′ W. 3.50 ch.); North sixty-four degrees and thirty minutes West, three chains and fifty-one links (N. 64 degrees 30′ W. 3.51 ch.) to an artificial stone monument on the bank of said Slough, the center point of which monument is on an East and West line passing
77 through a point twenty-nine chains and eighty links (29.80) ch.) South of the intersection of the East bank of said Steamboat Slough by the aforesaid East and West quarter section line of section twenty-five, in Township five North, Range Three East (Sec. 25 in T. 5 N., R. 3 E.), as the location of such quarter section line is fixed and established in manner aforesaid; and thence through the center of the last above-mentioned monument on the same line whereon said monument is planted, West one hundred and thirty-seven chains and sixty links (137.60 ch.), more or less, to another artificial stone monument on the same line, planted at the East base of the said Steamboat Slough Levee; and thence continuing on the same course through said last mentioned monument to said Steamboat Slough; thence meandering along the East bank of said Slough, up stream, to the point of beginning; containing twelve hundred and sixty-two (1262) acres. Run by true meridian. Magnetic Variation, 17 degrees 04′ East. All in Sacramento County, State of California.

No. 12. Beginning at a post on Union Island on the East base of the "Wing Levee" said post being at the North West corner of the so called "Outside Lands" owned by David Bixler, and being at the West end of the division line between the lands of the said David Bixler, and the Williams Estate, as said division line and North West corner were established by Julius H. Smith in 1889, running thence Northerly along the East base of the said "Wing Levee" to a post set on a line, running East and West, which line is due North 3212.6 feet of the point of beginning; thence due East to the
78 Westerly bank of Middle River, thence Southerly along the said Westerly bank of Middle River to a point which is due East of the point of beginning, thence running due West along the division line between the lands of David Bixler and the Williams Estate to the point of beginning. Containing 108.25 acres. In San Joaquin County, State of California.

And that the following described pieces and parcels of land shall be and the same hereby are distributed as follows, to Frank Hansford Johnson, forty per cent., undivided thereof in fee, to Thomas H. Williams, Jr., twenty six and two thirds per cent. undivided in fee, and to George E. Williams, as trustee, for the benefit of said Thomas H. Williams, Jr. during his life, and thereafter as provided in said last will and testament of said decedent, thirty three and one-third per cent. undivided thereof in fee.

No. 1. Beginning at a point on Williams ranch on Union Island on the center of the "Cross Levee" said point being on an East and West line passing through a point due North 9880.3 feet from the monument at the North East corner of the lands of David Bixler on the West base of the "Kidd Levee" as such corner was established by Julius H. Smith in 1889, said point of beginning being further fixed and established by a monument bearing North 77 degrees 30′ East distant 10. feet from it, thence from said point of beginning North 77 degrees 30′ East 280. feet to a monument, thence North 12 degrees 30′ West 240. feet to a monument, thence South 77 degrees 30′ West 270. feet to a monument on the East slope of the "Cross Levee," thence continuing on the same course South 77 degrees 30′ West 60. feet more or less to the division line between the land of David Bixler and the Williams Estate as established by Julius
79 H. Smith in 1889, on the West side of the "Cross Levee," thence Southerly along said division line 240 feet more or less to a point South 77 degrees 30′ West 50. feet more or less from the point of begi[illegible]ing, thence North 77 degrees 30′ East 50 feet more or less to the point of beginning, containing 180 acres more or less. All courses true, Magnetic Variation 17 degrees 30′ East in San Joaquin County, State of California.

No. 2. Beginning at a post on Union Island marked "B" on the East side and "W" on the West side, on the Northerly edge of the canal known as the Grant Line Canal, and distant 137 chains and 25 links Westerly from the Southwest pile, marked "B" of the wharf on said Canal, situate on the West side of the cross levee known and designated as the Elk Ridge Cross Levee, at its intersection with the levee known and designated as the Grant Line Levee, said post being the Southwesterly corner of that portion of said New Reclamation belonging to David Bixler and running thence along the Northerly edge of said Grant Line Canal Westerly to the junction of said Canal with Old River; thence along the right or Easterly bank of Old River Northerly to the South side of a navigable Canal connecting Old River with Middle River and known and designated as the North Canal; thence North Eighty Eight degrees and forty minutes West twelve chains and twenty-three links, (N. 88 degrees 40′ W. 12.23 ch.) across said canal to a post on Levee, thence North twenty-eight degrees West two hundred feet (N. 28 W. 200 feet); thence North sixty-two degrees East and parallel with the South bank of said Canal, and eight chains and seventy-four links (8.74 chs.) North Westerly therefrom three hundred and eighteen chains and forty-one links (N. 62 degrees E. 318.41 ch.) more or less,
80 to the left or Westerly bank of Middle River, thence meandering up the left or Westerly bank of Middle River, in a South Easterly direction, crossing the entrance to said canal and continuing on a post, due North of the point of beginning marked "W" on the West side and "B" on the East side, said post being the North Westerly corner of the land in the New Reclamation belonging to said David Bixler, and thence South three hundred and fifty-six chains and thirteen links (South 356.13 ch.) to the point of beginning. Containing eight thousand eight hundred and fourteen and 97/100 acres (8814.97/100 acres) more or less, all in San Joaquin County, State of California.

No. 3. The undivided two-thirds of the North end of Union Island, situate in San Joaquin County, State of California, and more particularly described as follows, to-wit: all that portion of said Union Island lying North and West of the North Canal, estimated to contain about seventy-five hundred acres, bounded in the West by the Old River, on the East by Middle River, on the North by the North line of Sections 29.28 and 27 in Township One (1) North, Range 4 East Mt. Diablo Meridian and on the South by the Northerly edge of said North Canal, excepting therefrom, however a strip of land four hundred feet wide along the Northerly side of said North Canal for the whole length thereof.

81 No. 4. Swamp and Overflowed Land in Yolo County, California, Belonging two-thirds to Estate of Thomas H. Williams, Deceased (George E. Williams, Executor), and one-third to David Bixler.

Description.	Section.	Township.	Range.	Area, acres.
All of sections 1, 2, 11, 12, 13, 14, 22, 23, 26, 27, 28, 33, 34 and 35	...	6 N.	3 E.	9860.00
S. ½ of	21	"	"	320.00
S. E. ¼ of	29	"	"	160.00
S. E. ¼ of	32	"	"	160.00
S. ½ of	31	"	"	320.00
Fractional S. W. ¼ of " S. E. ¼ of " N. W. ¼ of	36	"	"	285.71
Fractional W. ½ of	25	"	"	313.83
Fractional S. E. ¼ of	24	"	"	60.57
All W. ½ and N. E. ¼ of	24	"	"	480.00
W. ½ of	18	6 N.	4 E	320.00
Fractional N. E. ¼ of	18	"	"	123.61
W. ½ of	8	"	"	320.00
N. W. ¼ Fractional S. W. ¼ of " N. E. ¼ of	5	"	"	248.71
All of	6	"	"	640.00
All of	37	"	"	640.00
All of	30	7 N.	4 E.	640.00
All of	31	"	"	640.00
Total forward				14632.43

82 Total forward				14632.43
W. ½ and fractional W. ½ of E. ½	32	7 N.	4 E.	428.72
W. ½ of	29	"	"	320.00
W. ½ of S. E. ¼ Fractional N. E. ¼	19	"	"	634.72
All of	25	7 N.	3 E.	640.00
N. ½ and S. E. ¼ of	36	"	"	480.00
S. ½ of	35	"	"	320.00
Total				17455.87

5-28/100 acres es. N. E. ¼ of Sec. 19, T. 7 N., R. 4 E., were formerly conveyed to and are included in Lisbon S. L. District. All in Yolo County, State of California.

83 No. 5. List of Swamp and Overflowed Land in Solano County, Belonging to the Estate of Thomas H. Williams, Deceased (Geo. E. Williams, Executor), Two-thirds, and to David Bixler, One-third.

T. 5. N., R. 3 E.

	Acres.
Fractional N. E. ¼ of Sec. 2	136.52
Fractional S. E. ¼ " " "	103.89
Fractional S. W. ¼ " " "	154.81
N. W. ¼ " " "	160
N. ½ & S. W. ¼ of Sec. 3	480
Fractional N. W. ¼ of Sec. 10	139.41
N. E. ¼ and fraction in N. part of S. E. ¼ of Sec. 9	162.20
N. W. ¼ of Sec. 9	160
N. ½ of S. W. ¼ of Sec. 9	80
Whole of Sec. 4	640
" " " 5	640
" " " 8	640
E. ½ & N. W. ¼ of Sec. 6	480

T. 5 N., R. 2 E.

W. ½ & N. E. ¼ of Sec. 1	480
Acres	4459.83

The whole comprising Swamp Land Surveys Nos. 636, 561, 606, 532, 550 & 585. All in Solano County, State of California.

84 No. 6. The undivided two-thirds of all those certain lots, pieces or parcels of land situate, lying and being in the City and County of San Francisco, State of California, being lots numbers One (1) Two (2) Three (3) Four (4) Five (5) Seven (7) Eight (8) Twenty-one (21) Twenty-two (22) and Twenty-four (24) in Block number one hundred and seventeen (117) South San Francisco, being the same premises purchased by said party of the first part from the Tide Land Commissioners of the State of California on the 10th day of July, One Thousand Eight hundred and seventy-two, said Block number One hundred and seventeen (117) being bounded on the North by Sixth Avenue; on the West H Street; on the South by Seventh Avenue and on the East by G. Street, in the City and County of San Francisco, State of California.

And that the following described articles of personal property shall be and the same hereby are distributed, as follows: To Frank Hansford Johnson, forty per cent. undivided thereof, in fee, to Thomas H. Williams, Jr., twenty six and two thirds per cent. undi-

vided in fee, and to George E. Williams, as trustee, for the benefit of said Thomas H. Williams, Jr., during his life, and thereafter as provided in said last will and testament of said decedent, thirty-three and one third per cent. undivided thereof in fee.

85 D.

1 Black Saddle Horse
1 Buckskin Mare, old,
1 Brown Driving Horse
1 Sorrel Driving Mare, old,
2 Small Mules
2 Draft horses
1 Old Chestnut Horse, Byron,
1 old Gray Mare, Daisy,
1 One Buckboard,
One Top Buggy.
One car
One Spring Wagon,
Three Old Wagons,
Steamer Mary B. Williams Und. $\frac{2}{3}$ Undivided,
Dredger "Thor" Undivided $\frac{2}{3}$.
24804 shares of stock in the Tide Land Reclamation Company.
16$\frac{2}{3}$ Shares of stock in the Isleton Ferry Co.
$\frac{2}{3}$ of two undivided shares of Freeport Telephone and Telegraph Co.

86 The following pieces and parcels of land be and the same are hereby distributed to George E. Williams, for the benefit of Thomas H. Williams, Jr., during his life, as provided in said last will and testament of said decedent, and thereafter in accordance with the last will and testament of said decedent.

No. 14. All the lands included in Swamp and Overflowed land Surveys of said County of Contra Costa, numbered respectively Four hundred and two (402) Two hundred and sixty (260), One hundred and thirty-two (132), Two hundred and eighteen (218), Two hundred and nineteen (219), two hundred and thirteen (213), One hundred and thirty-one (131), two hundred and nine (209), Two hundred and ten (210), Two hundred and eleven (211), Two hundred and twelve (212), Two hundred and forty-eight (248), Two hundred and forty-seven (247), Two hundred and sixty-one (261), Two hundred and seventeen (217), Two hundred and sixteen, (216), Two hundred and eight (208), and one hundred and thirty-eight (138) and being the fractional South half (S. ½) of Section fourteen (14) and fractional Southwest quarter (S. W. ¼) of section thirteen (13), lying South of the San Joaquin River;—Fractional Southeast quarter (S. E. ¼) of Section Twenty-two (22);—Section Twenty-three (23);—Fractional Section Twenty-four (24);—East half (E. ½) of Section Twenty-eight (28), and fraction in Northwest quarter (N. W. ¼) of Section Twenty-eight (28);—lying East, North and South of Fisherman's Slough—East half (E. ½) of Section twenty-seven (27);—Section twenty-six

(26);—Section Twenty-five (25);—East half (E. ½) of
87 Section Thirty-three (33);—Section Thirty-four (34);—
Section Thirty-five (35);—Section Thirty-six (36);—All in Township Three North (Tp. 3 N.) Range Three East (R. 3 E.) Mount Diablo Base and Meridian;—Fractional West half (W. ½) of section Nineteen (19);—Fractional West half (W. ½) of Section thirty (30);—and Fraction in Southeast quarter (S. E. ¼) of Section Thirty (30);—Fractional West half (W. ½) of Section Thirty-one (31), lying West of Old River;—All in Township Three North (Tp. 3 N) Range Four East (R. 4 E.);—Fraction in Northeast quarter (N. E. ¼) of Section Four (4), lying North of False River;—Fraction in North half (N. ½) of Section Three (3), lying North of False River;—All in Township Two North (Tp. 2 N.) Range Three East (R. 3 E.), Mount Diablo B. & M.—

All the lands included in Swamp and Overflowed Land Surveys of said County of Contra Costa, numbered respectively, Two hundred and Twenty-nine (229), Two hundred and ninety-five (295), Two hundred and ninety-four (294), Two hundred and twenty-eight (228), two hundred and ninety-three (293), Four hundred and one (401), One hundred and seven (107), Two hundred and twenty-four (234), Two hundred and ninety-two (292), Two hundred and twenty-one (221), Two hundred and ninety-seven (297), and Three hundred and three (303), and being the Southeast quarter (S. E. ¼) of Section three (3);—South half (S. ½) of Section Two (2);—Section one (1);—Fraction in Northeast quarter (N. E. ¼) of Section Ten (10), lying North and East of Piper Slough;—Section Eleven (11)—Section Twelve (12);—Section Fourteen (14);—Section Thirteen (13);—The East half (E. ½) of Section Twenty-two (22);—Section Twenty-three (23); Section Twenty-four (24);—The East half (E. ½) of Section twenty-seven (27);—
Section Twenty-six (26);—Section Twenty-five (25);—Sec-
88 tion Thirty-five (35);—Section Thirty-six (36);—All in Township Two North (Tp. 2 N.) Range Three East (R. 3 E.);—Fraction in Northwest quarter (N. W. ¼) of Section Six (6); lying West of Old River;—Fraction in South half (S. ½) of Section Six (6), lying South of Old River;—Fractional West part of Northwest quarter (N. W. ¼), Fractional Southwest quarter (S. W. ¼) Fractional Southeast quarter (S. E. ¼), and Fractional North half (N. ½) of Section Seven (7);—Fraction in Southwest quarter (S. W. ¼) of Southwest quarter (S. W. ¼) of Section Eight (8), lying South and West of Old River;—Fraction in West half (W. ½) of Section Seventeen (17), lying West, North and South of Old River;—West half (W. ½) and Northeast quarter (N. E. ¼) of Section Eighteen (18) and Fraction in Southeast quarter (S. E. ¼) of Section Eighteen (18) lying West of Old River; Fractional West half (W. ½) Fraction of Southeast quarter (S. E. ¼) and Fraction of Northeast quarter (N. E. ¼) of Section Nineteen (19) lying West of Old River;—Fractional West part of West half (W. ½) of Section thirty (30) lying West of Old River;—Fractional West half (W. ½) and Fraction in Northeast quarter (N. E. ¼) and Fraction in Southeast quarter (S. E. ¼) of Section

Thirty-one (31), lying West of Old River; all in Township Two North (Tp. 2 N.) Range Four East (R. 4 E.) Mount Diablo Base and Meridian.

All the lands included in Swamp and Overflowed Land Surveys of said County of Contra Costa, numbered respectively, One hundred and seventeen (117), Four hundred and ten (410), Ninety-five (95), Four hundred and eight (408), One hundred and sixteen (116), Four hundred and eleven (411), Ninety-six (96),
89 Ninety-nine (99), One hundred and one (101), and a portion of the lands included in Swamp and Overflowed Land Survey of said County of Contra Costa number Four hundred and nine (409), and being all of section one (1);—East half (E. ½) of Section Eleven (11);—Section Twelve (12);—East half (E. ½) of Section Fourteen (14);—Section Thirteen (13);—All in Township One North (Tp. 1 N.) Range Three East (R. 3 E.) West half (W. ½) of Section six (6) and Fractional East half (E. ½) of Section Six (6), lying West of Old River; Fraction in West part of West half (W. ½) of Section five (5) lying West of Old River;—Fraction in Southwest quarter (S. W. ¼) of Section Five (5), lying South and West of Old River;—Section Seven (7);—Fraction in Northwest quarter (N. W. ¼) of Section Eight (8) lying West, North and South of Old River, and Fraction in Southwest quarter (S. W. ¼) of Section Eight (8)—Section Eighteen (18);—Fractional West half (W. ½) and Fraction in West part of East half (E. ½) of Section Seventeen (17) lying West of Old River;—All in Township One North (Tp. 1 N.) Range Four East (R. 4 E.) Mount Diablo Base and Meridian.

Excepting and reserving therefrom, however, Five hundred and thirty-one and fifty-five hundredths (531.55) acres of the South portion of said Swamp Land Survey number Three hundred and three (303) and being that portion of the lands embraced in said survey that lie South of a line drawn from East to West across said survey parallel with and sufficient far North from the South line thereof, to embrace said quantity of five hundred and thirty-one and fifty-five hundredths (531.55) acres.—

90 And also excepting and reserving Fifty (50) acres of the lands embraced in said Swamp Land Survey Two hundred and thirteen (213) and being Fifty (50) acres of the extremity of the spit or peninsula between Elk Slough and the San Joaquin River, and bounded Northerly by said San Joaquin River and Easterly and Southerly by said Elk Slough and West by a line drawn due North and South across said spit or peninsula.—

And excepting and reserving, however, therefrom, the lands heretofore conveyed by Thomas H. Williams to Patrick H. McEvoy, by deed dated November 23rd, 1876, and recorded December 13th, 1876, in Volume 31 of Deeds at page 439, in the office of the County Recorder of said County of Contra Costa; which lands amount to five hundred and fifteen and twenty-eight hundredths (515.28) acres and are part of Sections One (1) Two (2) Eleven (11), and twelve (12), in Township Two North (Tp. 2 N.) Range Three East

(R. 3 E.) and of Section Seven (7) in Township Two North (Tp. 2 N.) Range Four East (R. 4 E.)—

And excepting and reserving therefrom, however, the lands heretofore conveyed by Thomas H. Williams to Sarah Louise Snodgrass and R. V. Snodgrass, by deed dated October 18th, 1876, and recorded February 14th, 1877, in Volume 32 of Deeds, at page 27, in the office of the County Recorder of said County of Contra Costa, which lands amount to Fifty-Eight and eighty-three hundredths (58.83) acres of land. All said lands being situate in Contra Costa County State of California.

91 No. 16. Beginning at the fence post on Williams Ranch on Union Island designated as "B" at the South East corner of the orchard in the North West portion of the "Kidd Ranch;" said post being 9475.00 feet North and 2762.9 feet East of the monument at the North East corner of the lands of David Bixler, as said point was established by Julius H. Smith in 1889, on the West base of the "Kidd Levee," running thence along the fence marking the Easterly boundary of said orchard, North 22 degrees 05′ West 3558. feet to a point on the center of "Middle River Levee" thence continuing on the same course North 32 degrees 05′ East 100. feet more or less to the Southerly bank of "Middle River," thence ascending the Southerly and Westerly bank of said "Middle River" in a South Easterly direction to a point which is on a line bearing South 89 degrees 14′ East and which passes through the point of beginning, said line being established by a monument on the Westerly slope of the West Levee on "Middle River," thence running North 89 degrees 14′ West 4385. feet, more or less to the point of beginning Containing 324. acres. All courses true, Magnetic Variation 17 degrees 30′ East, in San Joaquin County, State of California.

92 No. 18. Commencing at a monument on Union Island on the division line between the lands of David Bixler and the Williams Estate, which is distant due West 5587.7 feet from the monument marking the North East corner of the lands of David Bixler on the West base of the "Kidd Levee," as such corner and division line was established by Julius H. Smith in 1889, thence from said point of beginning due North 8696.2 feet to a monument, thence due West 7708.5 feet to a point on the center of the "Cross Levee" from which point due East 10. feet is a monument marking said East and West line, thence continuing due West 50. feet more or less to the division line on the West side of the "Cross Levee" between the lands of David Bixler and the Williams Estate as established by said Smith in 1889; thence Southerly along said division line on the West side of said Levee, to its intersection with an East and West line passing through the point of beginning, and being also the division line between the lands of David Bixler and the Williams Estate as established by said Smith in 1889, said East and West line being fixed and established by a monument on the East slope of the "Cross Levee," thence due East 6160. feet more or less to the point of beginning. Containing 1354.81 acres. All courses true, Magnetic Variation, 17 degrees 30′ East. All in the County of San Joaquin, State of California.

No. 21. That parcel of land, portion of Swamp Land Survey No. 311, situated in said Sacramento County being also a portion of said Grand Island, bounded and described as follows:

93 Beginning at the Northwest corner of the parcel of land, portion of said Swamp Land Survey No. 311, occupied by William Kesner, and running thence North fifty-two degrees West, thirty-four chains, more or less (N. 52 degrees W. 34.00 ch.) to an iron pipe on the Easterly bank of Beaver Lake. Thence meandering along the said bank of said Lake, the following courses and distances; North fourteen degrees and 55 minutes East, six chains and forty-three links (N. 14 degrees 55′ E. 6.43 ch.; North thirty-nine degrees and five minutes East, two chains and fifty links (N. 39 degrees 05′ E. 2.50 ch.); North fifty-three degrees and thirty-two minutes East, nine chains (N. 53 degrees 32′ E. 9.00 ch.); North forty-three degrees and seventeen minutes East, eleven chains and seventy five and 8/10 links (N. 43 degrees 17′ E. 11.758 ch.) to an artificial stone monument on the Southeasterly bank of said Lake; thence leaving said Lake, South twenty-two degrees and twenty-five minutes east, thirty-five chains and sixty links, more or less (S. 22 degrees 25′ E. 35.60 ch.), to another artificial stone monument on the line; thence continuing on the same course to Old River about two chains (2 ch.) distant; thence meandering Old River on its Northeasterly bank, South thirty-four degrees and forty-eight minutes West, ten chains and thirty links, more or less (S. 34 degrees 48′ W. 10.30 ch.) to the point of beginning; containing sixty-nine and 50/100 (69.50) acres. Run by true meridian. Magnetic variation, 17 degrees 04′ East. All in Sacramento County, State of California.

No. 22. Beginning at the Northeast corner of Swamp and Overflow Land Survey Number 510 as such corner is fixed and established by the intersection of the North Westerly bank of the

94 Sacramento River with the center line produced of the line ditch between Swamp and Overflow Land Surveys Numbers 321 and 510; run thence along the center line of said ditch N. 51 degrees 42′ W. 40. chs. more or less to the center line of a main Drainage Canal; thence South 34 degrees 16′ W. 100. feet along center of said canal; thence leaving canal run S. 51 degrees 42′ E. parallel to the center line of said line ditch 40 chs. more or less to the North Westerly bank of the Sacramento River, said last mentioned parallel line being fixed and established by artificial stone monuments planted on the South Easterly bank of the aforementioned canal and on the inside slope of the Levee of the North Westerly bank of the Sacramento River; run thence along the North Westerly bank of the Sacramento River up stream about 100. feet to the point of beginning. Containing 6.00 acres run by true meridian, Magnetic Variation, 17 degrees 04′ E. all in Sacramento County, State of California.

No. 23. Beginning at a point on Grand Island on the East Bank of the Western branch of the Sacramento River, commonly known as "Steamboat Slough" where said bank is intersected by an East and West line parallel with, and 17.99 chs. South of the East and West quarter-section line of section one in Township four North

four North R. 3 E., as the location of said quarter-section line is fixed and established by an artificial stone monument planted on the East edge of the top of the Steamboat Slough Levee the center point of which monument is on the South boundary of the tract of land belong- to H. H. Hinshaw, and is a recognized point on said quarter-section line, and running East from said point of beginning
95 2.00 chs. more or less, to the center point of an artificial stone monument planted on said parallel line at the East base of the Levee situate on the East bank of Steamboat Slough; thence continuing East 40.00 chs. more or less on said East and West parallel line to its intersection with the North and South quarter-section line of Sec. 1 in T. 4 N. R. 3 E. as such intersection is fixed and established by the center of an artificial stone monument; thence South 22.01 chs. on or very nearly on said North and South quarter-section line to a point at or very nearly at the South West corner of the South East quarter of Section 1 in T. 4 N. R., 3 E. as such point is fixed and established by the center of an artificial stone monument; thence, continuing on the same line, South 33.125 chs. to the center of another artificial stone monument, thence East 80. chs. to the center of an artificial stone monument, thence South 19.21 chs. on or very nearly on the Section line between Sections 7 and 8 and 17 and 18 in T. 4, R. 4 E. to the center of an artificial stone monument, thence South 60 degrees 38′ West 40.255 chs. to an iron pipe heretofore planted in the ground as a monument; thence South 30 degrees 50′ East 19.92 chs. to a point in the center line of the main Drainage Canal at or very nearly at, the Northwest corner of Swamp Land Survey No. 320; thence along the center line of said Canal South 46 degrees 59′ West 40.25 chs.; thence leaving canal, run due West 65.12 chs. to the center line of another main Drainage Canal, said East and West line being fixed and established by artificial stone monuments planted on the Westerly and East banks, respectively of said Canals; run thence along the center line of said last mentioned Canal, North 0 degrees 09′ East 34.44 chs.; thence leaving
96 said Canal and running South 89 degrees 57′ East 40.12 chs. to the center of a post one foot square, heretofore planted in the ground as a monument; thence North 0 degrees 03′ East 20.91 chs. to an iron pipe heretofore planted in the ground as a monument, next to a post one foot square; thence North 89 degrees 12′ West 68.00 chs. to Easterly bank of Steamboat Slough; thence meandering said Easterly bank, up stream, in a general Northeasterly direction to point of beginning. Containing 1073.95 acres. Run by true meridian. Magnetic variation 17 degrees 04′ East. All in Sacramento County, State of California.

And it appearing that during the administration of said estate, George E. Williams, the executor of said last will and testament, under the powers in him vested by said will, did execute to the Security Savings Bank of San Francisco, promissory notes for the sum of seventy five thousand dollars, and interest, which said debts are unpaid and are secured by mortgages on the property belonging to said estate, and described as follows, to-wit:

No. 13. Beginning at the South East corner of Sansome and

Sacramento Streets in the City and County of San Francisco, State of California, and running thence Easterly along the Southerly line of Sacramento Street one hundred and eighty-five feet; thence at right angles Southerly one hundred and twenty-four feet to the Northerly line of Halleck Street; thence Westerly along the Northerly line of Halleck Street one hundred and eighty-five feet to the Easterly line of Sansome Street; and thence Northerly along said line of Sansome Street, one hundred and twenty-four feet to the
97 place of beginning, all in the City and County of San Francisco, State of California.

And it appearing that said Security Savings Bank, has consented by an instrument in writing herein filed, that said land and mortgaged property may be distributed the undivided one half thereof in fee, to Thomas H. Williams, Jr., and the undivided one half thereof in fee to said Frank Hansford Johnson, subject, however, to the lien of said mortgages, the same to be specifically charged with the payment of said sum of seventy-five thousand dollars, and interest, and the performance of all the covenants in said mortgages contained, by the said mortgagor to be kept and performed,

It is hereby ordered, adjudged and decreed, all parties thereto consenting, that said described property to wit,

No. 13. Beginning at the South East corner of Sansome and Sacramento Streets in the City and County of San Francisco, State of California, and running thence Easterly along the Southerly line of Sacramento Street one hundred and eighty-five feet; thence at right angles Southerly one hundred and twenty-four feet to the Northerly line of Halleck Street; thence Westerly along the Northerly line of Halleck Street one hundred and eighty-five feet to the Easterly line of Sansome Street; and thence Northerly along said line of Sansome Street, one hundred and twenty-four feet to the place of beginning. All in the City and County of San Francisco, State of California be and the same is hereby distributed, as follows, the one undivided one half thereof in fee to Thomas H. Williams,
98 Jr., and the other undivided one-half thereof in fee, to said Frank Hansford Johnson, the whole of said property being however hereby directly and specifically charged with a lien for the payment to said Security Savings Bank of the sum of seventy five thousand dollars and interest, as provided in said promissory notes herein-before recited, and with the performance of all the covenants and conditions of the mortgages executed by said George E. Williams to said Security Savings Bank, by him to be kept and performed.

It is hereby further ordered, adjudged and decreed that all other property belonging to said estate, not *know* known or discovered, or in which said estate may have any interest, be and the same is hereby distributed as follows: Twenty six and two thirds per cent. absolutely and in fee to Thomas H. Williams, Jr., forty per cent. absolutely and in fee to Frank Hansford Johnson, and thirty three and two thirds per cent. to George E. Williams, as trustee, for the benefit of said Thomas H. Williams, Jr., during his life, and thereafter, as provided in said will of said deceased testator.

Done in open court this 5th day of January, 1897.

J. V. COFFEE, *Judge*.

(Endorsed:) No. 5083—9—M. B. 207. Page 45. Superior Court, City and County of San Francisco, State of California. In the Matter of the Estate of Thomas H. Williams, Deceased. Decree of Final Distribution and order settling Final Account. Filed —— 18—. Filed Jan. 5—1897 C. F. Curry, Clerk, By V. F. Northrop, Deputy Clerk. By ——— — Deputy Clerk. Rothschild & Ach, Attorneys for Executor, 303 California Street, San Fran-
99 cisco.

(Endorsed:) No. 13592. Circuit Court of the United States Northern District of California. In Equity. George G. Goodrich, Complainant *vs.* John W. Ferris, *et als.*, Bill of Complaint. Filed May 19th, 1904. Southard Hoffman, Clerk. Johnson & Johnson, Solicitors for Complainant, Mills Bldg., San Francisco, Cal.

100 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. In Equity.

The President of the United States of America to John W. Ferris, individually and as trustee; Frank Hansford Johnson, an infant; Frank S. Johnson, as guardian of the estate of Frank Hansford Johnson; Thomas H. Williams, Jr., Thomas H. Williams, 2d, an infant under the age of 14 years, who resides with his father, Thomas H. Williams, Jr.; Georgie E. Williams and Jennie R. Williams, heirs at law of George E. Williams, Deceased, Greeting:

You are Hereby Commanded, That you be and appear in said Circuit Court of the United States aforesaid, at the Court Room in San Francisco on the Fourth day of July, A. D. 1904, to answer a Bill of Complaint exhibited against you in said Court by George G. Goodrich, of New York City, who is a citizen of the State of New York, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of May in the year of our Lord one thousand nine hundred and four and of our Independence the 128th.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By ——— ———, *Deputy Clerk*.

101 *Memorandum Pursuant to Rule* 12, *Rules of Practice for the Courts of Equity of the United States.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of July next, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill will be taken *pro confesso*.

SOUTHARD HOFFMAN, *Clerk*,
By ——— ———, *Deputy Clerk*.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CAL.

I hereby certify and return, that I received the within writ on the 19 day of Apl. 1904, and personally served the same on the 8th day of May, 1904, on Thomas H. Williams, 2d an infant under the age of 14 years by delivering to and leaving with an adult Chinese person who refused to give me his name but informed me that he was employed as a servant by, and resided in the family of Thomas H. Williams, Jr., at No. 2900 Pacific Avenue, San Francisco, at the City & County of San Francisco in said District, an attested copy thereof, at the usual place of abode of said Thomas H. Williams, 2d, one of said defendants herein.

JOHN H. SHINE,
U. S. Marshal,
By R. DE LANCIE,
Office Deputy.

San Francisco, June 11th, 1904.

102

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify and return, that I received the within writ on the — day of May, 1904, and personally served the same on the 26th day of May, 1904, on Frank Hansford Johnson an infant by delivering to and leaving with Frank Hansford Johnson an infant one of said defendants named therein, at San Rafael County of Marin in said district, an attested copy thereof.

JOHN H. SHINE,
U. S. Marshal,
By R. DE LANCIE,
Office Deputy.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify and return, that I received the within writ on the — day of May, 1904, and personally served the same on the 27th day of May, 1904, on Frank S. Johnson, as guardian of the estate of Frank Hansford Johnson by delivering to and leaving with said Frank S. Johnson an adult person, who is a member or resident in the family of one of said defendants named therein, at the City and County of San Francisco, in said district, an attested copy thereof.

JOHN H. SHINE,
U. S. Marshal,
By R. DE LANCIE,
Office Deputy.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify and return, that I received the within writ on the — day of —— 190–, and personally served the same on the

31st day of May, 1904, on John W. Ferris individually and
103 as trustee by delivering to and leaving with John W. Ferris individually and as Trustee, two of said defendants named therein, at the City and County of San Francisco, in said District, an attested copy thereof, one with said John W. Ferris individually, and one with said John W. Ferris as Trustee.

JOHN H. SHINE,
U. S. Marshal,
By R. DE LANCIE,
Office Deputy.

San Francisco.

(Endorsed:) Marshal's Docket No. 3348. Original. No. 13592. U. S. Circuit Court, Ninth Circuit, Northern District of California. In Equity. George G. Goodrich *vs.* John W. Ferris, *et al.* Subpœna *Ad Respondendum.* Filed Jun. 13, 1904. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

104 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS, Individually and as Trustee; FRANK HANSFORD JOHNSON, an Infant; FRANK S. JOHNSON, as Guardian of the Estate of Frank Hansford Johnson; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, 2D, an Infant under the Age of Fourteen Years, Who Resides with His Father, Thomas H. Williams, Jr.; GEORGIE E. WILLIAMS, and JENNIE R. WILLIAMS, Heirs-at-Law of George E. Williams, Deceased, Defendants.

Petition for Appointment of Guardian Ad Litem.

To the Honorable Circuit Court of the United States, for the Ninth Judicial Circuit, for the Northern District of California:

The petition of Thomas H. Williams respectfully shows:

That he is one of the defendants in the above entitled action; that he is the father of Thomas Hansford Williams, Jr., a minor under the age of fourteen years, to wit, of the age of two years and about six months; that said minor child is named as a defendant in the above entitled action; that said minor child is the child of petitioner herein and Beatrice Steele Williams, the wife of petitioner; your petitioner represents that said minor is a resident of the City and County of San Francisco, in the Northern District of California, and your petitioner is a resident of the City and County of San Francisco, in the Northern District of California;

That your petitioner has been appointed the general guardian of the estate and person of the said minor, Thomas Hansford
105 Williams, Jr., called Thomas Hansford Williams, 2d, in the complaint herein: that your petitioner has no interest adverse to that of the said infant; that your petitioner is not connected in

business with the adverse party, or with the attorney, solicitor or counsel of the adverse party; that your petitioner now is the duly appointed, acting and qualified guardian of the estate and person of the said Thomas Hansford Williams, Jr.; that your petitioner is of sufficient pecuniary ability to answer to the infant Thomas Hansford Williams for any damage or injury which might be sustained by the infant for any negligence or misconduct in the said above entitled cause; that the bill of complaint has been filed in the above entitled action, in the above entitled court;

Your petitioner further states that this is a proper case for the appointment of a guardian *ad litem* for the said Thomas Hansford Williams, Jr.

Wherefore, your petitioner prays that he be appointed guardian *ad litem* of and for the said Thomas Hansford Williams, Jr., herein.

THOS. H. WILLIAMS, *Petitioner.*

HENRY ACH,
Attorney for Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Thomas H. Williams, the petitioner named in the foregoing petition being first duly sworn deposes and say: that he has heard read the foregoing petition by him subscribed and knows the
106 contents thereof; that the same is true according to his best knowledge, information and belief.

THOS. H. WILLIAMS.

Subscribed and sworn to before me this 19th day of September, 1904. CHARLES R. HOLTON, [SEAL.]
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Filed September 23, 1904. Southard Hoffman, Clerk.

107 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

GEORGE G. GOODRICH, Complainant.
vs.
JOHN W. FERRIS, Individually and as Trustee; FRANK HANSFORD JOHNSON, an Infant; FRANK S. JOHNSON, as Guardian of the Estate of Frank Hansford Johnson; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, 2D, an Infant under the Age of Fourteen Years, Who Resides with His Father, Thomas H. Williams, Jr.; GEORGIE E. WILLIAMS, and JENNIE R. WILLIAMS, Heirs-at-Law of George E. Williams, Deceased, Defendants.

Order Appointing Guardian Ad Litem.

The application to appoint a guardian *ad litem* of Thomas Hanford Williams, Jr., coming on to be heard, upon the petition of

Thomas H. Williams, representing that Thomas Hansford Williams, Jr., one of the above named defendants is under the age of fourteen years, to wit, of the age of two years and about six months, and asking for the appointment as guardian *ad litem* of the person and estate of said minor in said cause; and it appearing that Thomas H. Williams is the duly and legally appointed, acting and qualified guardian of the estate and person of said Thomas Hansford Williams, Jr., and has no adverse interest to that of the infant, and is not connected in business with the adverse party, or with the attorney, solicitor or counsel of the adverse party, and that petitioner is of sufficient pecuniary ability to answer to the defendant for any damage or injury which may be sustained by the infant through the negligence or misconduct of the said Thomas H. Williams in the above entitled cause;

108 It is hereby ordered that Thomas H. Williams be and he is hereby appointed by this court as guardian of the person and estate of said Thomas Hansford Williams, Jr., in said cause.

WM. W. MORROW, *Judge*.

Dated September 23d, 1904.

Endorsed: Filed, September 23, 1904. Southard Hoffman, Clerk.

109 In the Circuit Court of the United States for the Northern District of California, Ninth Judicial Circuit. In Equity.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS ET AL., Defendants.

Demurrer of John W. Ferris et al.

The demurrer of John W. Ferris, individually and as trustee, of Thomas H. Williams, pleaded as Thomas H. Williams, Jr., of Georgie E. Williams, of Jennie E. Williams, and of Thomas H. Williams, 2d., an infant under the age of fourteen years, by Thomas H. Williams his guardian *ad litem*, respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto and for cause of demurrer show;

1. That the complainant has not in and by said bill made or stated such a case as doth, or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from and against these defendants, or either of them.

2. That it appears from said bill of complaint of the complainant herein, that this court has no jurisdiction to hear and determine this action.

3. That the said bill of complaint of the complainant herein is wholly without equity as against these defendants, or either of them.

4. That it appears upon the face of said bill that the acts of these defendants, and each and all of them, as alleged in said bill
110 constituting the cause of suit herein, were not, nor was either or any of them, committed or done within three years next preceding the commencement of this action, and that this action was commenced more than three years after the alleged commission, and after the full opportunity to discover, and after the discovery of each and all of the acts and things in said bill charged.

5. That the said cause of action set forth in said bill of complaint against each and all of these defendants is barred by subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

6. That it appears upon the face of said bill of complaint that all the matters and things in said bill of complaint alleged, occurred and were done and had, and that the said complaint had the means or knowledge and ample opportunity to know and did know of the same, and that the said alleged cause of action in said bill set forth accrued more than four years prior to the institution of this suit.

7. That the said cause of action set forth in said bill of complaint against each and all of these defendants is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

8. That it appears from said bill of complaint, that said complainant has been guilty of gross and inexcusable laches in, of and concerning the matters and things complained of in said bill of complaint against each and all of these defendants, and that the remedy of said complainant is barred by lapse of time.

9. That the said bill of complaint is ambiguous, and is not clear, concise or certain in this, that it does not appear, nor can it be determined from said bill of complaint why complainant did not discover said alleged fraud therein set forth in his bill of
111 complaint in the year 1893, nor why such fraud was not discovered by him until the time of the alleged discovery thereof, as set forth in said bill of complaint.

10. That the said bill of complaint is ambiguous, vague, uncertain and deficient in that it does not show what information or knowledge or advice said complainant had of or concerning the will of Thomas H. Williams, deceased; the probate of said will; the estate left by him; the administration thereof; why George E. Williams declared to complainant that his deceased wife had no interest in said estate, and that his deceased wife had no property of any kind or character, and that she left no estate; what said George E. Williams actually said in that behalf, or in what capacity, or in response to what inquiries he spoke; or why complainant believed or relied upon any representations, declarations, or statements of George E. Williams; or what said George E. Williams actually said or did to induce complainant to forbear or abstain from making inquiries concerning, or from investigating the records of the estate of said deceased, and the questions and facts relating thereto.

11. That said complaint is ambiguous, uncertain, vague and deficient, in that it does not appear that said George E. Williams was

acting in the matters and things set forth in said bill of complaint, for or on behalf of either of the demurring defendants herein.

12. That said bill of complaint is uncertain, ambiguous, unintelligible, rambling and defective in that it does not appear, nor can it be determined by this court, or the defendants, whether complainant was never put upon inquiry concerning the facts and transactions alleged and complained of, or that he was put upon inquiry and failed to gain the required information by reasonable
112 diligence.

Wherefore, these defendants demand the judgment of this Honorable Court, whether they, or either of them, shall be compelled to make any further or other answer to the said bill, or to any of the matters or things therein contained, and pray to be hence dismissed with their, and each of their, reasonable costs in this behalf sustained.

HENRY ACH,
Solicitor for Said Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John W. Ferris being duly sworn deposes and says, that he is one of the respondents named in the bill of complaint herein; that the foregoing demurrer is not interposed for delay.

JOHN W. FERRIS.

Subscribed and sworn to before me this 20th day of October, 1904.

CEDA DE ZALDO, [SEAL.]
Notary Public in and for the City and County of San Francisco, State of California.

Certificate of Counsel.

The undersigned does hereby certify that in his opinion the foregoing demurrer is well founded in point of law.

HENRY ACH,
Solicitor for Said Defendants.

Endorsed: Receipt of a copy of the within demurrer is hereby admitted this 20th day of October, 1904. Johnson & Johnson, Attorney for Pl'ff. Filed October 20th, 1904. Southard Hoffman, Clerk.

113 In the Circuit Court of the United States for the Northern District of California. Ninth Judicial District.

GEORGE G. GOODRICH, Complainant,
v.
JOHN W. FERRIS ET AL., Defendants.

Demurrer of Frank S. Johnson to Bill of Complaint.

Now comes the defendant Frank S. Johnson, described and sued herein as guardian of the estate of Frank Hansford Johnson, an infant, and by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows and specfies:

I.

That said complainant has not in and by his said bill of complaint made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him, as to the matters contained in said bill or any such matters; and said bill does not contain any matter of equity whereon this court can ground any decree, or give any relief to the complainant against this defendant.

II.

That said bill of complaint does not state facts sufficient to constitute a cause of action.

III.

114 (*a*) That it appears upon the face of said bill of complaint that the acts of this defendant, as well as the other acts and things in said bill alleged as constituting the cause of suit therein, were not, nor was any of them, committed or done within three years next preceding the commencement of this action, and that this action was commenced more than three years after the alleged commission, and after the opportunity to discover, and after the discovery of, the, and all of the, acts and things in said bill charged.

(*b*) That the cause of action set forth in said bill of complaint is barred by the provisions of subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

IV.

(*a*) That it appears upon the face of said bill of complaint that the matters and things in said bill of complaint alleged, occurred and were done, and that said complainant had the means of knowledge and ample opportunity to know, and did know of the same, and that the alleged cause of action in said bill set forth accrued, more than four years before this suit was commenced.

(*b*) That the cause of action set forth in said bill of complaint is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

V.

That it appears upon the face of said bill of complaint that the complainant has been guilty of gross and inexcusable laches in discovering the acts, facts and fraud charged, and that his remedy is barred by length of time since he should have discovered; was afforded the opportunity for discovering, and did discover the material facts alleged.

115

VI.

(*a*) That the said bill of complaint is exhibited against this defendant, and against the several other defendant- to said bill, for several and independent matters and causes, in none of which, as appears by said bill, is this defendant in any manner interested or concerned, and he ought not to be implicated.

(*b*) That there is a misjoinder of parties defendant as to the alleged cause of action set forth in said complaint in that it does not appear therefrom that this demurrant is either a necessary or proper party to said cause of action; on the contrary it appears from the allegation of said bill that this demurrant is neither a necessary nor a proper party defendant, because, as appears from said bill, this demurrant was not a devisee, legatee, or beneficiary under the will of the Thomas H. Williams deceased, named in said bill; nor was he an heir at law of said deceased; nor was any of the estate of said deceased distributed to him; nor is he in privity with said deceased; nor does he, nor did he ever, succeed to, own, take or claim any part of the estate of said deceased, or any right, title or interest therein.

VII.

(*a*) That said bill of complaint is neither clear, concise, nor certain in this; that it does not appear, nor can it be determined from said bill why complainant did not discover the alleged fraud set forth in said bill in 1893, nor why such fraud was not discovered by him until the time of its alleged discovery thereof in 1903.

(*b*) Said bill is vague and deficient in certainty in that it does not show with any particularity, nor at all, what information or knowledge said complainant had of or concerning the will of Thomas H. Williams, deceased; the probate of said will; the estate left by him; the administration thereof; why George E. Williams

116 declared to complainant that his deceased wife had no interest in said estate, and that his deceased wife had no property of any kind or character, and that she left no estate; what said George E. Williams actually said in this behalf, or in what capacity, or in response to what inquiries he spoke; or why complainant believed or relied upon any representations, declarations, or statements of George E. Williams; or what said George E. Williams actually said to induce complainant to forbear or abstain from making in-

quiries concerning, or from investigating the records of the estate of said deceased and the questions and facts relating thereto.

(c) Said bill is uncertain, ambiguous, unintelligible, and defective in that it does not appear therefrom nor can it be determined by this court, or defendant, whether complainant was never put upon inquiry concerning the facts and transactions alleged and complained of, or that he was put upon inquiry and failed to gain the required information by reasonable diligence.

Wherefore this defendant prays the judgment of this court, whether he shall be compelled to make any further or other answer to the said bill, or to any of the matters and things therein contained, and prays that he be hence dismissed with his charges and costs in this behalf sustained.

BIGELOW & DORSEY,
THOMAS, GERSTLE & FRICK,
Solicitors for Defendant.

FRED L. BERRY, *of Counsel.*

117 DISTRICT OF NORTHERN CALIFORNIA,
City and County of San Francisco, ss:

Frank S. Johnson, being duly sworn, deposes and says: That the foregoing demurrer is not interposed for delay.

FRANK S. JOHNSON.

Subscribed and sworn to before me this 20th day of October, 1904.

ALFRED A. ENQUIST, [SEAL.]
Notary Public in and for the City and County of San Francisco, State of California.

Certificate of Counsel.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

BIGELOW & DORSEY,
THOMAS, GERSTLE & FRICK,
FRED L. BERRY,
Counsel for Frank S. Johnson, Defendant.

Endorsed: Due service by copy of the within Demurrer is hereby admitted this 20th day of October A. D. 1904. Johnson & Johnson. Filed Oct. 20, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

118 In the Circuit Court of the United States for the Northern District of California, Ninth Judicial District.

GEORGE G. GOODRICH, Complainant,
v.
JOHN W. FERRIS ET ALS., Defendants.

Demurrer of Frank Hansford Johnson, an Infant, to Bill of Complaint.

Now comes the defendant, Frank Hansford Johnson, an infant, by Frank S. Johnson, the general guardian of the estate of said infant, duly appointed as such by the Superior Court of the County of Marin, State of California, and by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows and specifies:

I.

That said complainant has not in and by his said bill of complaint made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him, as to the matters contained in said bill or any of such matters; and said bill does not contain any matter of equity whereon this court can ground any decree, or give any relief to the complainant against this defendant.

II.

That said bill of complaint does not state facts sufficient to constitute a cause of action.

119 III.

(*a*) That it appears upon the face of said bill of complaint that the acts of this defendant, as well as the other acts and things in said bill alleged as constituting the cause of suit therein, were not, nor was any of them, committed or done within three years next preceding the commencement of this action, and that this action was commenced more than three years after the alleged commission, and after the opportunity to discover, and after the discovery of the, and all of the, acts and things in said bill charged.

(*b*) That the cause of action set forth in said bill of complaint is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

IV.

(*a*) That it appears upon the face of said bill of complaint that the matters and things in said bill of complaint alleged, occurred and were done, and that said complainant had the means of knowledge and ample opportunity to know, and did know of the same, and

that the alleged cause of action in said bill set forth accrued, more than four years before this suit was commenced.

(*b*) That the cause of action set forth in said bill of complaint is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

V.

That it appears upon the face of said bill of complaint that the complainant has been guilty of gross and inexcusable laches in discovering the acts, facts, and fraud charged, and that his remedy is barred by length of time since he should have discovered; was afforded the opportunity of discovering, and did discover the material facts alleged.

120 VI.

(*a*) That said bill of complaint is neither clear, concise, nor certain, in this: that it does not appear, nor can it be determined from said bill why complainant did not discover the alleged fraud set forth in said bill in 1893, nor why such fraud was not discovered by him until the time of the alleged discovery thereof in 1903.

(*b*) Said bill is vague and deficient in certainty in that it does not show with any particularity nor at all what information or knowledge said complainant had of or concerning the will of Thomas H. Williams, deceased; the probate of said will; the estate left by him; the administration thereof; why George E. Williams declared to complainant that his deceased wife had no interest in said estate, and that his deceased wife had no property of any kind or character, and that she left no estate; what said George E. Williams actually said in this behalf, or in what capacity, or in response to what inquiries he spoke; or why complainant believed or relied upon any representations, declarations, or statements of George E. Williams; or what said George E. Williams actually said to induce complainant to forbear or abstain from making inquiries concerning, or from investigating, the records of the estate of said deceased and the questions and facts relating thereto.

(*c*) Said bill is uncertain, ambiguous, unintelligible and defective in that it does not appear, therefrom, nor can it be determined by this Court, or defendant, whether complainant was never put upon inquiry concerning the facts and transactions alleged and complained of, or that he was put upon inquiry and failed to gain the required information by reasonable diligence.

121 Wherefore this defendant prays the judgment of this court, whether he shall be compelled to make any further or other answer to the said bill, or to any of the matters and things therein contained, and prays that he be hence dismissed with his charges and costs in this behalf sustained.

BIGELOW & DORSEY,
THOMAS, GERSTLE & FRICK,
Solicitors for Defendant.

FRED L. BERRY,
Of Counsel.

DISTRICT OF NORTHERN CALIFORNIA,
City and County of San Francisco, ss:

Frank S. Johnson, being duly sworn, says That he is the Frank S. Johnson named in the bill of complaint herein; that he is the guardian of the estate of Frank Hansford Johnson, an infant, named in said bill of complaint, and that as such he makes this verification; that the foregoing demurrer is not interposed for delay.

FRANK S. JOHNSON.

Subscribed and sworn to before me this 20th day of October, 1904.

ALFRED A. ENQUIST, [SEAL.]
Notary Public in and for the City and County of San Francisco, State of California.

Certificate of Counsel.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

BIGELOW & DORSEY,
THOMAS, GERSTLE & FRICK,
FRED L. BERRY,
Counsel for Frank Hansford Johnson, an Infant.

Endorsed: Due service of copy of the within demurrer is hereby admitted this 20th day of Oct. A. D. 1904. Johnson & Johnson, Solicitors for Complainant. Filed Oct. 20, 1904. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

122 At a stated term, to wit: the November term A. D. 1904. of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Monday the 16th day of January in the year of our Lord one thousand nine hundred and five.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 13592.

GEORGE G. GOODRICH
vs.
JOHN W. FERRIS ET AL.

Order Allowing Complainant to File Amendment to Bill of Complaint.

This cause came on regularly this day to be heard upon the several demurrers of the defendants to the bill of complaint herein. Albert M. Johnson, Henry E. Monroe and Henry Arden Esqs. appeared as solicitors for complainant and in support of the bill, and Henry

Ach Esq. appeared as solicitor for defendants Ferris, *et al;* Wm. Thomas and J. W. Dorsey Esqs. appeared as solicitors for defendants Frank H. Johnson, *et al.* Upon motion of Mr. Johnson, complainant was allowed to file amendments to his bill, and all parties are allowed to file additional memoranda of authorities herein. Thereupon argument was made by Mr. Ach and the cause was continued to the head of the law and motion calendar for Monday, April 10, 1905, for further argument.

123 In the Circuit Court of the United States, Northern District of California, in and for the Ninth Judicial District. In Equity.

No. 13592.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS ET AL., Respondents.

Amendment to Bill of Complaint.

Complainant in the above entitled suit, while demurrers to his bill of complaint are pending, and before the hearing thereof, amends the said bill by changing same in the following particulars, viz:

1. Strike out from the word "and" in line 16, page 3, down to and including the last word, "Thomas H. Williams, Jr.", in line 28, same page, of said bill of complaint, and insert in lieu thereof the following, viz:

"That said Percy Williams died on or about the 3d day of October, 1890, being at the time of his death a resident of the County of San Joaquin, State of California; that he left a will by the terms of which he devised and bequeathed all of his property and estate to his widow, one Bessie L. Trahern Williams, and appointed the said Thomas H. Williams, Jr., executor of such will; that said will was by an order of the Superior Court of the State of California, in and for said County of San Joaquin, duly given and made on the — day of ——, 1890, admitted to probate as the last will and testament of said Percy Williams, deceased, and the said Thomas H. Williams, Jr., was appointed executor thereof, and he having qualified as such, letters testamentary were issued unto him by the clerk of said court on the — day of ——, 1890, which have never been revoked, and he has ever since been and still is the duly appointed, qualified and acting executor of said will of Percy Williams, deceased; that, as complainant is informed and believes and upon such information and belief alleges the said Thomas H. Williams Jr., has acquired all the right, title and interest of said Bessie Trahern Williams of, in, and to the estate of said Percy Williams, deceased, which comprises all of the interest of the latter in the estate of said Thomas H. Williams, deceased, and he, said Thomas H. Williams, Jr., now claims to own the same."

124 2. Between lines 22 and 23 of page 27, add to said bill of complaint the following, viz:

"That in the said petition of said George E. Williams for the distribution of said estate of said Thomas H. Williams deceased, the said George E. Williams stated, among other things, as follows, to wit:

"That numerous controversies have heretofore existed between Thomas H. Williams, Jr., hereinbefore named, and Frank S. Johnson, the guardian of Frank Hansford Johnson, a minor, and that no other persons are interested in the distribution of the estate belonging to the deceased testator, except your petitioner, said Frank H. Johnson, and Thomas H. Williams, Jr. * * *

"That the said Frank S. Johnson, guardian as aforesaid, and the said Thomas H. Williams, Jr., have agreed upon an amicable settlement of all disputes between them, and the said Frank S. Johnson has due and legal authority to enter into and to consent to
125 such settlement in the distribution of the estate of Thomas H. Williams deceased."

That in said petition of Frank S. Johnson, as guardian of the estate of said Frank Hansford Johnson, the said Frank S. Johnson stated among other things as follows: "That all of the children of the said Thomas H. Williams, named in said will, excepting Thomas H. and Mary, have died without issue, and that Mary, the daughter of said Thomas H. Williams, mentioned in said will, has died leaving one child, the said minor, who is the sole issue of said Mary and your petitioner, who were husband and wife.

That complainant is informed and believes and upon such information and belief alleges that the said allegation was made for the purpose of inducing the court to which said petition was presented to believe and by the same the said court was induced to believe that the said petitioner, said respondent Frank S. Johnson was the husband of said Mary Williams at the time of her death. That in said petition of said Frank S. Johnson in behalf of his ward, said Frank H. Johnson, the said petitioner stated also the following: "That many questions have arisen, followed by controversies between your petitioner, representing said minor, and Thomas H. Williams, Jr., the surviving son and only child living of said Thomas H. Williams, deceased, and who is over the age of 21 years, in relation to the distributive share of said minor of the properties of said estate That the settlement of such questions and controversies through the courts involves the determination of many intricate, difficult and unsettled questions of testamentary construction, and of facts, and will require the expenditure of large sums of money and great delay in the settlement of said estate. That, as
126 your petitioner is informed and believes, it is for the best interests of the estate of said minor to make an equitable settlement and adjustment of all diffierence between said minor and the said Thomas H. Williams, Jr., relating to the distribution of said estate, and accordingly your petitioner under the advice of counsel and subject to the approval of this court, has on behalf of

said minor agreed with Thomas H. Williams, Jr., to settle all matters of doubtful construction of said will and all questions and matters of difference between them in relation to said estate and the properties thereof * * * ."

That in said petition of said Thomas H. Williams, Jr., for the distribution of the estate of said Thomas H. Williams, deceased, the said Thomas H. Williams, Jr., stated among other things the following: "That prior to the filing of this petition, your petitioner and said Frank Hansford Johnson, acting by and through his guardian, as aforesaid, Frank S. Johnson, and the said George E. Williams, have fairly, thoroughly and in detail agreed upon what property shall be set apart and distributed to George E. Williams for the benefit of your petitioner during his life, as provided in said will, and what part and portion of said property shall be distributed to said Frank Hansford Johnson in fee and what property shall be distributed to your petitioner in fee under the terms of said will. That your petitioner and said Frank H. Johnson and said George E. Williams are the only persons interested in said estate."

That said Thomas H. Williams, Jr., also stated in his said petition the following: "Your petitioner further represents that prior to the appointment of appraisers herein as hereinbefore recited,
127 on the 12th day of August, 1896, a controversy had arisen between your petitioner and Frank S. Johnson, the said guardian of said Frank Hansford Johnson, in regard to the method in which the property of the estate of said deceased testator should be distributed. That a settlement of said controversy through the courts involved the determination of many intricate, difficult and unsettled matters of testamentary construction and of fact, and would require the expenditure of large sums of money and great delay in the settlement of said estate, and that the said parties in interest have, subject to the approval of this court, amicably and equitably settled and adjusted all difficulties between them, and that said Frank S. Johnson, as the guardian of said minor, has obtained from the Superior Court of Marin County, State of California, having jurisdiction of the estate of said Frank Hansford Johnson, a minor, due and legal authority to enter into and to consent to such settlement and to the distribution of said estate of Thomas H. Williams, deceased, hereinbefore prayed for * * *. That in order to carry such settlement into effect your petitioner has yielded to said Frank Hansford Johnson such a proportion of said estate claimed by your petitioner in fee as would insure to said Frank Hansford Johnson and to said George E. Williams, trustee, any and all amounts which might be claimed by them respectively under any construction of said will or under any settlement of the disputed questions of fact."

That the said allegations of respondents Frank S. Johnson and Thomas H. Williams, Jr., and Geo. E. Williams in their said petitions were made for the purpose and with the intent of inducing the said probate court to withhold its consideration and determination of said questions of law, and in order to prevent the submission of

the same to the said probate court and to avoid a considera-
128 tion of same by said court.

That relying upon the said allegations contained in said petitions that the said minor and said Thomas H. Williams, Jr., were the only persons interested in the distribution of the estate of said Thomas H. Williams, deceased, and that they had made an agreement respecting the distribution of the property of said estate, which they desired the court to carry into effect by a consent decree, the said probate court was induced to believe and did believe that said minor and said Thomas H. Williams, Jr., were the only persons interested in the said estate and the only persons concerned in the distribution thereof, and that their agreement was operative to settle and adjust their respective rights and differences and to distribute said estate lawfully, and the court did thereupon, pursuant to said petitions and in accordance with said agreement, make the said consent decree of distribution, but in so doing the said court being imposed upon by said allegations in said petitions and relying thereon, as aforesaid, and believing that the said Thomas H. Williams, Jr., and said Frank Hansford Johnson were the only persons interested in said estate, and that their agreement made as aforesaid operated to settle and adjust their respective rights and differences, and to distribute said estate among all the persons interested in said estate, did not consider any of said questions of law or fact, and the same were never presented to said court, and they were never adjudicated upon, and none of them was ever adjudicated or determined.

That among the questions of law referred to in the allegations of said petitions, concerning which questions controversies had arisen between the said parties, was the question of the true construction of said will of said Thomas H. Williams, deceased; and that all
129 said parties knew that the trust attempted to be created by said will was void for the reasons hereinbefore stated and that, as to the real property comprising the estate of said Thomas H. Williams, deceased, he had died intestate; and that if said questions were submitted to said probate court, the determination thereof could not be otherwise than that the said trust was void and that said decedent had died intestate, and that the complainant was entitled to a distributive share of said estate.

That the said allegations of said petition of respondent Frank S. Johnson, guardian, were made with intent to deceive said court of Marin County into the belief that no person was interested in said matter than said minor and his guardian and by reason thereof to withhold notice to complainant of such petition and said agreement; and said court, being by said petition and the representations therein made, as aforesaid, that no person other than said minor and his guardian was interested in said matter omitted to give any notice of the hearing of said petition of said guardian, but granted same *ex parte* upon the faith of said petition and a written con-suit, purporting to be by all persons interested, signed by respondents Frank S. Johnson, Thomas H. Williams, Jr., and said George E. Williams.

That by reason of the said petitions of said George E. Williams,

Jr., and the said petition of respondent Frank Hansford Johnson by his said guardian, they made it appear to said probate court, that all persons interested in the estate of said Thos. H. Williams, deceased, had consented to an agreement providing for the distribution of and effectual to distribute finally said estate and that, because of such consent and agreement of all persons interested in said
130 estate, it would not be necessary for the said court to consider or determine any of the questions of law and fact which it was stated in said petitions had arisen among respondents, (including the question of the construction of said will of said Thos. H. Williams, deceased, and the validity of the trust created thereby;) and, therefore, upon the hearing of said petitions for distribution, the said court did so believe, and by reason of such belief, it was induced to and did forbear and refrain from all inquiry into and consideration of such questions of law and fact, and upon such hearing no testimony was taken, none of such questions was discussed, no evidence was submitted thereon, except said petitions themselves and said agreement, no argument was had upon any of said questions, none of them was contested, and the merits of the controversies that had arisen upon such questions, as stated in said petitions, were not inquired into or considered at all, but, upon the representations made in said petitions, as aforesaid, and the same representations which were again made by said respondents Johnson and Thos. H. Williams, Jr., and said George E. Williams at the hearing of said petitions that all such matters and things had been settled by agreement, the said probate court, upon their application, made said decree, but only as a consent decree to record and carry into effect the said agreement of said Geo. E. Williams and respondents Johnson and Thos. H. Williams, Jr., and not otherwise.

That by reason of the representations and declarations of said Geo. E. Williams, made in 1893 to complainant, as hereinbefore alleged, he was induced to believe, and he did believe, until November, 1903, that his wife, said Mary William Goodrich, had left no prop-
131 erty or estate whatever, and that her interest in the estate of her father, said Thos. H. Williams, deceased, ceased with her death.

That said Geo. E. Williams was by profession an attorney-at-law of many years' practice and of great experience, and for a number of years he was a judge of the Superior Court of the State of California. Complainant is not a lawyer, never was, and knew nothing of the laws of California. Complainant knew nothing about the will of Thos. H. Williams, deceased, was not familiar with its terms, and was not aware of the nature or extent of the provisions it made for his wife. All he knew was that his wife during their married life was receiving money from her father's estate in California. How much she was thus receiving and had received complainant did not know, and during all their married life, they lived in New York City, where complainant has resided for twenty years last past. That the lands described in said decree of distribution are not of a fluctuating value. They are worth now no more than they were when respondents acquired possession and control of them, as herein al-

leged. No improvements of great value or consequence have been made upon them, and respondents are now in possession of them, as herein alleged, and the rents, issues and profits of such lands since respondents obtained them, as aforesaid, have largely exceeded in value and amount any moneys expended by respondents for taxes, insurance, repairs or bet-erments or improvements of any kinds.

Dated January 16, 1905.

JOHNSON & JOHNSON,
Solicitors for Complainant.

MONROE & CORNWALL,
LOUTTIT & LOUTTIT,
Counsel.

Endorsed: Receipt of a copy of the within amendment to complainant is hereby admitted this 16th day of January, 1905. Henry Ach, Attorneys for Ferris & all Williams. Thomas Gerstle & Frick. J. W. Dorsey, Fred L. Berry. Filed January 16, 1905. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

132 At a stated term, to wit: the March term A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Monday the 21st day of May in the year of our Lord one thousand nine hundred and six.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 13592.

GEO. G. GOODRICH
vs.
JOHN W. FERRIS ET AL.

Order Sustaining Demurrers and Dismissing Bill of Complaint and Amendments to Bill.

The separate demurrers of the defendants to the bill of complaint and amendment thereto heretofore heard and submitted herein, being now fully considered, and the opinion of the Court having been filed, it is, in accordance therewith ordered that said demurrers and each of them be and hereby is sustained; that complainant's bill and amendments thereto be and are dismissed for lack of equitable jurisdiction, and that a decree be filed and entered herein accordingly with costs; counsel to prepare decree.

133 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13592.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS ET AL., Defendants.

Enrollment.

The Complainant filed his bill of complaint herein on the 19th day of May 1904, which is hereto annexed.

A Subpœna to appear and answer in said cause was thereupon issued, returnable on the 4th day of July, A. D. 1904, which is hereto annexed.

The Defendants appeared herein on the 4th day of July 1904, by Thomas, Gerstle & Frick; J. W. Dorsey; Frederick Berry and Henry Ach, their Solicitors.

On the 23d day of September 1904, a Petition for the appointment of a Guardian *ad litem* was filed herein, which is hereto annexed.

On the 23d day of September 1904, an Order appointing Guardian *ad litem* was filed herein, which is hereto annexed.

On the 20th day of October 1904, the Demurrers of John W. Ferris *et al.*, the Demurrer of Frank S. Johnson, and the Demurrer of Frank Hansford Johnson, an infant, were filed herein, which are hereto annexed.

On the 16th day of January 1905, an Order was made allowing complainant to file amendments to bill, a copy of said order is hereto annexed.

On the 16th day of January 1905, Amendment to Bill of Complaint was filed herein, which is hereto annexed.

On the 21st day of May 1906, an order sustaining demurrers and dismissing Bill of Complaint and Amendments thereto, was made and entered herein, a copy of which is hereto annexed.

134 Thereafter, on the 11th day of October 1906, a Decree was signed, filed and entered herein in the words and figures following, viz :

135 In the Circuit Court of the United States for the Northern District of California in and for the Ninth Judicial Circuit. In Equity.

No. 13592.

GEORGE G. GOODRICH, Complainant,

vs.

JOHN W. FERRIS, Individually and as Trustee; FRANK HANSFORD JOHNSON, an Infant; FRANK S. JOHNSON, as Guardian of the Estate of said Frank Hansford Johnson; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, 2D, an Infant under the Age of 14 Years; GEORGIE E. WILLIAMS and JENNIE R. WILLIAMS, Heirs-at-Law of George E. Williams, Deceased, Defendants.

Decree Dismissing Bill.

In this cause the demurrers of the respondents John W. Ferris, individually and as trustee: Frank Hansford John, an infant; Frank S. Johnson as guardian of the estate of said Frank Hansford Johnson; Thomas H. Williams, Jr., Thomas H. Wiliams 2d, an infant under the age of 14 years; Georgie E. Williams and Jennie R. Williams, heirs at law of George E. Williams, deceased, to the complainant's bill of complaint and amendments to said bill, came duly on for hearing and were argued by counsel for the respective parties and submitted to the Court for decision, and the premises being seen and fully understood, and upon consideration thereof, it is ordered by the Court that said demurrers and each of them be and the same is hereby sustained; and it is further ordered that the said bill of complaint and the amendments thereto be and the same are hereby dismissed for lack of equitable jurisdiction with costs to the said respondents to be taxed.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed and entered October 11, 1906. Southard Hoffman, Clerk.

136 *Certificate to Enrollment.*

Whereupon, said pleadings, subpœna, copies of orders, and decree, are hereto annexed; said final decree being duly signed, filed and enrolled, pursuant to the practice of said Circuit Court.

Attest my hand and the seal of said Circuit Court, this 11th day of October, 1906.

[SEAL.] SOUTHARD HOFFMAN, *Clerk,*
By J. A. SCHAERTZER,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed October 11th, 1906. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

137 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13592. In Equity.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS ET AL., Defendants.

Monday, May 21, 1906.

Opinion.

Johnson & Johnson, Solicitors for Complainant; James A. Louttit, Henry Arden and Monroe & Cornwall, of Counsel.

Henry Ach, William Thomas, J. W. Dorsey, Solicitors for Defendants; Fred L. Berry, of Counsel.

MORROW, *Circuit Judge:*

This is a suit in equity, brought by the complainant, a citizen of the State of New York, against the defendants, citizens of the State of California, for the purpose of obtaining a decree adjudging that a final decree of distribution entered and recorded in the Superior Court of the City and County of San Francisco, State of California, in the matter of the estate of Thomas H. Williams, deceased,
138 on January 5, 1897, is fraudulent and of no force and effect against the complainant, and that the defendants be decreed to be trustees for the complainant of that part of the real estate of Thomas H. Williams, deceased, which complainant claims he is entitled to receive as heir at law of his deceased wife, who, it is alleged, was an heir of Thomas H. Williams, deceased. The Court is also asked to appoint a receiver of the said property, to take and hold the same and to collect the rents and profits thereof during the pendency of this suit, and upon the final decree to make such disposition of the property as in and by the decree directed, and that an accounting be had under the direction of the court, of the real estate which came into the hands of the defendants under said decree of distribution and the rents and profits thereof; that upon said accounting it be ascertained what portion of said real estate and of the rents and profits thereof the complainant is entitled to receive from the defendants and each of them, and that as to such portion, they and each of them be ordered and decreed severally to convey and transfer to the complainant such part so found due from each of them, or the value thereof. The bill of complaint was filed May 19, 1904, and an amended bill January 13, 1905.

The questions submitted to the court for determination arise upon a demurrer to the bill of complaint as amended. A brief statement of the facts of the case as they appear in the bill of complaint and the amended bill, will disclose the matters in controversy.

Thomas H. Williams, a resident of the City and County of San Francisco, and a citizen of the State of California, died on the 28th

day of February, 1886, seized and possessed of a large amount of real property situated in the State of California. This real property was subsequently appraised at the value of $1,459,445.08 and certain personal property at the value of $6,355.00. At the time of his death, Thomas H. Williams left no wife surviving him, and his only heirs at law were his children and lawful issue mentioned in the bill of complaint. The children were: Sherrod, Thomas H. Jr., Mary Bryant, Percy and Bryant. At the time of the death of Thomas H. Williams, his daughter Mary Bryant was the wife of Frank S. Johnson, by whom she had issue of the marriage with him, one son, the defendant, Frank Hansford Johnson, who at the time of the filing of the bill of complaint was about eighteen years of age. Mary was divorced from Frank S. Johnson, December 29, 1888, and on March 11, 1889, Frank S. Johnson was appointed guardian of Frank Hansford Johnson. On December 7, 1889, Mary married the complainant, and on October 3, 1893, Mary died. Percy married Bessie L. Trahern, August 1, 1888. A child was born to Percy and Bessie, November 12, 1889. This child died on February 16, 1890. Percy died October 3, 1890, leaving no issue. It is alleged in the amended bill of complaint, upon information and belief, that the defendant, Thomas H. Williams, Jr., has acquired all the right, title and interest of the said Bessie in and to the estate of the said Percy, which comprises all of the interest of the latter in the estate of said Thomas H. Williams, deceased. Sherrod died August 2, 1888, leaving no wife or issue. Bryant died May 2, 1893, unmarried and without lawful issue. Thomas H. Williams left two papers purporting respectively to be his last will and testament and codicil thereto. Copies of the will and codicil are attached to the bill of complaint. The will and codicil were admitted to probate in the Superior Court of the City and County of San Francisco, Probate Division, on the 6th day of April, 1886, and
140 letters testamentary issued by the court to George E. Williams, a brother of the decedent, and the executor and trustee named in the will, who thereupon qualified as such executor and took possession of the estate of Thomas H. Williams, deceased, as such executor and as testamentary trustee under said will, and entered upon the execution of said trust and carried on the business in which said Thomas H. Williams was engaged at the time of his death, and continued so to do until the 5th day of January, 1897, when a decree of distribution was entered in the Superior Court.

The will of Thomas H. Williams contained the following provisions, among others, relating to the distribution of the estate:

"Item 4. When the term of three years after my death, shall have elapsed, unless the executor, herein named, shall for good cause extend it for two years, or in case there be another executor, three of my children, or representatives shall by writing, extend it for two years, distribution of my estate, shall be made, as herein directed.

"Item 8. I hereby appoint my brother George E. Williams, executor of this will, and that no bonds, or security, be required of him, for the execution of the trust, or discharge of the office.

"Item 9. That no confusion may arise, in reference to title to any

property of my estate, I hereby devise that all of the property of which I die the owner, or which may in any way become part of my estate, vest absolutely in my executor herein appointed, and his successor, successors in office. That the title thereto be held by him, or his said successor, or successors in office, until by death of
141 my said several children, the property set aside for each, be vested in their respective heirs, as herein provided, said executor, or his successor, or successors, to hold said property, and every part thereof, in trust for the uses and purposes in this will mentioned, and for the use and benefit of my children as herein provided.

"Item 10. To the Executor, herein appointed, I give, and grant, the following powers, and authority— 1. To carry on all business, in which I was engaged, at the time of my death. 2 To borrow money for the use of such business, or the benefit of my estate. 3 To bargain, sell and convey, any portion, or part, of the property of my estate, without any order of Court, or other proceeding, and to execute all mortgages, or conveyances, necessary, or deemed proper, by him. 4 To sell and convey, any part, or parcel, of property, set aside, for any one of my children, after distribution, as herein provided for, that he may re-invest the proceeds, for the distributee. In that case, his conveyance to be valid, may only recite, that he sells, for re-investment, and when he re-invests, it will be only necessary, to show by the conveyance, for whose ultimate benefit, the property is taken. It will be understood, that the terms 'conveyance' as here used, implies transfers of property, real, personal, or mixed. It being understood further, that no action of any Court, or consent of any person be necessary to execute these powers, having entire confidence, that he will act for the benefit of my children. I request of said executor to have all income of my estate, or sales of property, invested in property, or government securities, or in notes
142 bonds, or mortgages, for which property has been sold, at the time of distribution; except the Fifty Thousand ($50000.) Dollars, absolutely given Percy, which may be given in money, or property as desired.

"Item 12. In the event my brother, executes this will, I direct that the court, having jurisdiction, make him a fair, and liberal allowance, for all services, without reference to statutory, or other fees. In case of another appointment, I direct that the compensation of the executor, so appointed, be fixed before, and at the time of appointment, and that he be paid accordingly, and not otherwise. Will also direct, that the appointment of one of my sons, may not be objectionable, and in conveyance of property, in which he may be distributee, his personal assent may be expressed in the same instrument.

"Item 13. This will is lengthy, but I hope it clearly expresses my purposes thus.

"That with the exception of Fifty Thousand ($50000.) Dollars, the property of my estate, is to be 'set aside' in and for the benefit of my children, Thomas H Jr; Mary Bryant; and Percy; and Bryant, at the time of distribution, in the proportions of Two hundred thousand ($200,000.) Dollars to Mary, and One Hundred ($100,000.) Dollars to each of the others, with division between Mary, Tom, and

Percy, of the remainder of the estate. That each of said children is to have the net income of the estate 'set aside' for them respectively. That the legal title is to be, and remain in an executor, of the whole estate and each part thereof, until death inflicts her blows. That when a child dies, the estate 'set aside', for him, or her, vests
143 absolutely in his or her heirs, as herein provided, except in case of Bryant as hereinbefore mentioned, leaving the title, in remainder, in the executor, until each of the children, herein named, be dead."

It is alleged that under the laws of the State of California, and especially under Sections 715, 716, 749 and 771 of the Civil Code of California, the trust attempted to be created in and by said will was at the time of its creation and ever since has been void; that the absolute power of alienation of the property of said Thomas H. Williams included in said attempted trust was by said will and by the terms of the trust thereby attempted to be created, suspended for the term of three years and not for a period measured by the continuance of lives in being, and that, as to the property included in said attempted trust the said Thomas H. Williams died intestate, and that at his death the said property passed to and vested in his heirs at law in the proportions mentioned in the bill of complaint.

In the final decree of distribution, entered in the Superior Court on January 5, 1897, it was recited that Mary Bryant Williams, named in the last will and testament of the decedent, was a daughter of the said testator, and that during her life time she was married to Frank S. Johnson, and thereafter, and subsequent to the admission to probate of the last will and testament of the said decedent, the said Mary Bryant Johnson died, leaving as her sole surviving issue Frank Hansford Johnson; that Percy Williams, Bryant Williams and Sherrod Williams, sons of the testator, since the publication and admission to probate of the last will and testament of the decedent, had died without issue, and that Thomas H. Williams, Jr., and Frank Hansford Johnson, were the resid-
144 uary and sole devisees and legatees of the said testator. It was further recited that George E. Williams, the executor named in the last will and testament, was a brother of the decedent, and that it was provided in the will that in the event he executed the duties of an executor, the court having jurisdiction should make him a fair and liberal allowance for all services, without reference to statutory or other fees; and it appearing to the satisfaction of the court that the executor had rendered great, extraordinary and valuable services to said estate, and had performed all the labors thereof, the court, in view of the provision of the will, allowed him the sum of one hundred thousand dollars as compensation for his services, in addition to all sums theretofore paid on account of said services; and it appearing from the account on file that there was no money on hand with which to pay said sum, the court made said allowance a specific charge and lien upon certain real estate described in the decree and distributed to Thomas H. Williams, Jr.

It is alleged in the bill of complaint that in the proceedings and at the final hearing in the Superior Court, which resulted in the decree of distribution of the estate of Thomas H. Williams on the

5th day of January, 1897, the only parties to such proceedings were Thomas H. Williams, Jr., Frank Hansford Johnson, a minor, by his guardian, Frank S. Johnson, and George E. Williams, the executor, and that they consented to the decree.

On December 17, 1899, George E. Williams died, leaving his surviving wife, Jennie R. Williams, and their daughter, Georgia E. Williams, his heirs at law. Thereafter, such proceedings were had in the Superior Court of the City and County of San Francisco, that the defendant, John W. Ferris, was appointed trustee of the
145 estate of Thomas H. Williams, deceased, in the place and in stead of George E. Williams, deceased.

The bill of complainant charges that in all the proceedings in the Superior Court the existence of complainant and his interest in the estate was fraudulently concealed from the court; that he had no notice or knowledge of any of the proceedings taken for the distribution of the estate, or of the action or decree of the court thereon, and that in said proceedings for said final decree of distribution, no day was ever given to the complainant, and that his first knowledge thereof was in November, 1903.

It is further alleged that the complainant has not been in the State of California at any time since the death of his wife except for a few days immediately after her death, in 1893, when he brought the remains to San Francisco for interment; that while in San Francisco the said George E. Williams declared to the complainant that his wife had no interest in the estate of her deceased father or property of any kind or character whatever, and that she left no estate; that at the time of the death of complainant's wife she was indebted to a firm of jewelers in the City of New York to the amount of several thousand dollars and the creditors demanded payment of such indebtedness from the complainant; that when in San Francisco complainant informed George E. Williams of that fact and inquired of him whether the said wife of complainant had left any property or estate available for the payment of said demand, and the said George E. Williams assured complainant and represented, stated and declared to him that she had left no property or estate whatever, and complainant believed and relied upon the representations, declarations and statements of said George E. Williams, and was induced thereby to forbear any further inquiry relating
146 to the property or estate of his deceased wife, and being so induced, he did thereafter abstain from any such inquiry, and he knew nothing at all of the fact that he was entitled to any property as heir at law of his deceased wife, or under the will of Thomas H. Williams, deceased, until the month of November, 1903.

In the amended bill of complaint it is alleged that said George E. Williams was by profession an attorney at law of many years practice and of great experience, and for a number of years he was a judge of the Superior Court of the State of California; that complainant is not a lawyer, never was, and knew nothing of the laws of California; that complainant knew nothing about the will of Thomas H. Williams, deceased, was not familiar with its terms, and was not aware of the nature or extent of the provisions it made for his wife. All he knew was that his wife during their married life was receiving money

from her father's estate in California. How much she was thus receiving and had received, complainant did not know, and during all their married life they lived in New York City, where complainant has resided for twenty years last past.

It is further alleged in the original complaint that complainant was entitled to reasonable and sufficient notice of the proceedings in the Superior Court of the City and County of San Francisco upon the filing of the petition for distribution of the estate; that the orders were obtained by the defendants, Thomas H. Williams, Jr., Frank Hansford Johnson, through his guardian, and George E. Williams, purporting to fix the date for the hearing of said petitions and directing notices thereof to be given by posting of the same in three
147 public places in said City and County of San Francisco, to wit; one at the public morgue, one in the place where said court was held and one at the United States Court building; that said posting was by said order directed to be made ten days before the day fixed for the hearing of said petition for distribution; that the said period of ten days was an insufficient time for the plaintiff, who resided in the City of New York, to have by any possibility obtained knowledge of said notice and to have prepared for the hearing of said proceedings for distribution, and that said notice and the proceedings in pursuance thereof, were not and did not constitute due process of law within the meaning of Section 1 of Article XIV of the Constitution of the United States, and that complainant never had his day in court in said proceedings for distribution, and that the same were and are void; and complainant alleges that by reason of the proceedings had and taken by the defendants in the matter of the distribution of said estate, complainant has been deprived of his interest in said property of said decedent without due process of law, within the meaning of said Section 1 of Article XIV of the Constitution of the United States.

The will of Thomas H. Williams is dated the 29th day of October, 1885, and the codicil the 23d day of January, 1886. The will gave to the daughter, the testator's household furniture and pictures, and, to be set aside absolutely for her benefit, in property or money realized from sales of property, two hundred thousand dollars; then, after distributing three hundred and fifty thousand dollars to three of his remaining four children and providing for the investment of one thousand dollars each for the benefit of a niece, Mary Thomas, and his grandson Frank Hansford Johnson, the will provided
148 that the remainder of the estate should be set aside in equal shares for his daughter Mary Bryant and his two sons, Thomas H. Jr., and Percy.

Item 6 of the will provides as follows:

"Item 6. The first Fifty Thousand ($50,000.) Dollars, given to Percy, is intended to vest in him absolutely. But the remainder of the estate, is only intended for the use and benefit, of the children, during their respective lives, with remainder in fee to those herein named. If my daughter dies, leaving two children, or more, or one child, and the children, or child of another, then the estate set aside for her benefit, shall vest in said child, or children, or grand children *per stirpes*, as the case may be —. If she leaves one child, or

the child, or children of one child, then said estate shall vest one half in said child, or said grandchild, or children, and the other half, in Thomas H. Jr."

At the time this will was executed, and at the time of the death of the testator, Mary Bryant was the wife of Frank S. Johnson. Mary Bryant was divorced from Frank S. Johnson, December 29, 1888, and was married to the complainant December 7, 1889. She died October 3, 1893, and under the terms of the will Frank Hansford Johnson and Thomas H. Williams, Jr., were the only heirs to her interest in her father's estate.

The purpose of the bill of complaint is now reasonably clear in such detail as is material to the questions before the Court. The purpose of the bill is to secure a decree of this Court declaring the will of Thomas H. Williams, deceased, invalid and void by reason of certain of its provisions providing a trust for the administration of the estate which it is claimed attempted to suspend the power of alienation for a period of time longer than during the continuance of lives of persons in being at the creation of the limitation or condition; that the said Thomas H. Williams, therefore, died
149 intestate, and that his estate descended to his heirs under the law of the State; that complainant's wife was such an heir and under the law she inherited from her deceased father's estate and also from her deceased brothers' estates, and that the complainant was an heir to his deceased wife's estate; that in the probate proceedings in the Superior Court of the State, with respect to the estate of Thomas H. Williams, deceased, the existence of the complainant and his interest in that estate, was fraudulently concealed from the Court, and that the decree of distribution entered in the Superior Court was fraudulent and void as against complainant; that the notices of the hearing in the Superior Court upon the petitions for distribution of the estate were insufficient in point of time, to give the complainant knowledge of such hearing; that the notices and the proceedings in pursuance thereof did not constitute due process of law, and deprived the complainant of his interest in said estate without due process of law, contrary to section 1 of Article XIV of the Constitution of the United States.

The demurrers of the several defendants raise the question, among others, whether upon the facts stated, a court of equity in this State can decree the relief prayed for in the bill of complaint.

The first inquiry, therefore, relates to the nature and character of the jurisdiction of the Superior Court of the State in probate proceedings.

In the case of Broderick's Will, 21 Wall. 503, the inquiry resulted in the Supreme Court defining certain limitations to which a court of equity is subject in dealing with the proceedings of a probate court.

150 A suit in equity had been brought in this court by the alleged heirs of Senator Borderick, to set aside the probate of his will, to have the same declared a forgery, and to recover the assets of Broderick's estate, much of which consisted of real property. The defendants were the executors and several hundred persons who were in possession of portions of the real estate, claiming ownership

thereof as purchasers at sales made by the executors. The estate had been administered upon and distribution had been fully made before the institution of the suit. It was contended by the defendants that a court of equity had no jurisdiction of the subject matter of the suit, the same being vested exclusively in the probate court of the City and County of San Francisco. In sustaining this objection the Court said:

"As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of Kerrick *v.* Bransby, decided by the House of Lords in 1727, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts) the most satisfactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent
151 ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers, both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the Probate Courts, and the modes provided for reviewing their proceedings. And one of the principle reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the Probate Courts themselves have all the powers and machinery necessary to give full and adequate relief.

* * * * * * *

"The English authorities were fully discussed by Lord Lyndhurst in Allen *v.* McPherson, and by him and Lords Cottenham, Brougham, Langdale, and Campbell in the same case on appeal in the House of Lords. In that case a codicil was revoked by a subsequent one, in consequence of false and fraudulent representations on the part of the person to be benefitted by the change, prejudicing the testator against the person injured thereby. A bill was filed praying that the executor might be declared trustee for the first legatee to the extent of the legacies revoked. The bill was demurred to and dismissed; and the whole discussion turned upon the question whether or not the ecclesiastical court had jurisdiction to inquire of the matters of fraud alleged; and the court being of opinion that it had jurisdiction, the decree was affirmed. The court came to the

conclusion that the ecclesiastical court had power to refuse
152 probate of the revoking codicil, and, indeed, had had the question before it; but after investigating the facts had granted the probate. 'If,' said Lord Lyndhurst, 'an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a court of equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the Court of Probate, not by the judicial committee of the Privy Council, the proper tribunal for that purpose, but by the court of chancery. I think this cannot be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a court of equity; but that doctrine has long since been overruled.' Lord Lyndhurst also reviewed the cases in which a legatee or executor had been declared trustee for other persons, and came to the conclusion that they had been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. The effect of his reasoning was, that where a remedy is within the power of the ecclesiastical court, either by granting or refusing probate of the whole will or codicil, or of any portion thereof, a court of equity will not interfere. And this was the view of a majority of the law lords on that occasion, Lords Brougham and Campbell agreeing with Lord Lyndhurst."

The case of Broderick's Will arose under the judicial system provided by the old Constitution of the State of California, wherein the probate court was an inferior court. Under the present constitution and the laws passed in pursuance of its provisions, jurisdiction of all
matters of probate is vested in the Superior Court, a court of
153 original general jurisdiction in all cases in law and equity. (Sec. 5, Article VI., Constitution of 1879, and Sec. 73, Code of Civil Procedure) and the reasons for holding that the probate proceedings in the Superior Court are not open to review by a court of equity, are even greater now than they were with respect to proceedings in the former probate court.

In Toland *v.* Earl, 129 Cal. 148, the Supreme Court of the State, referring to some of its former decisions, calls attention to this difference between the old and new systems, and holds that cases for the construction of wills and of trusts thereunder arising under former constitution, which vested all equity jurisdiction in the district court and established separate probate courts, were inapplicable to the judicial system established under the new constitution, which vests both equity and probate jurisdiction in the Superior Court, and that one judge of the Superior Court, sitting in equity, could not instruct another sitting in probate.

The action in the case was brought by the administrator with the will annexed, for the purpose of having the probate court instructed as to what distribution should be made of the estate under the will. The Superior Court had entertained jurisdiction of the case, but the Supreme Court reversed the judgment and directed the Supreme Court to dismiss the action.

In the opinion, written by Mr. Justice Temple, he says:

"The legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a minute code has been provided, through which every purpose for which resort was formerly had to courts of equity is attained.

* * * * * * *

154 "If a legacy falls due, or a partial distribution of an intestate estate should be made, the probate court can order the personal representative to make the payment or distribution. This will also be done upon notice, and, the proceeding being *in rem*, when such notice is given the whole world is brought in. Surely, this must be exclusive of a suit in equity in which the parties are necessarily limited.

"The same is true as to the settlement of the accounts of the administrator or executor. Elaborate provision is made to force the executor or administrator to account, and in this accounting the creditors and distributees are interested. In an insolvent estate it is a necessary preliminary to the marshalling of the assets for payment of creditors, and it is always a necessary preliminary to a final distribution. This settlement made after the prescribed notice is conclusive upon all interested parties.

"But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes not only the law of personalty, but also the law of real estate. In other jurisdictions this decree is also held to be conclusive. But generally it concerns only personal property, and the power to make it does not involve the power to construe trusts in land created by the will. Here the probate court
155 not only may, but should, and often must, construe the trusts created by the will. After the decree is made the will practically drops out of existence. The law of the estate is the decree and not the will, and, as I have said, all deraignments of title are through it. (Goad *v.* Montgomery, 149 Cal. 552.)

"The proceeding differs much from the systems of administration where the personal property goes to the personal representative and the land to the heir. Here the relation of the probate court to the executor or administrator is much more analogous to the relation of a court to its receiver. And here, too, the entire probate proceeding from the grant of administration, or the probate of a will, is calculated to give notice to the heirs of a decedent, and special notice is required to be given of the time when distribution will be made, where all interested parties can be heard. The distribution is declared to be conclusive upon the whole world."

But the case of Sohler *v.* Sohler, 135 Cal. 323, is cited by the complainant in support of the claim that the defendants have been guilty of such fraud as would authorize a court of equity to decree

that they hold the distributed estate as trustees for the complainant to the extent of his interest therein. The action in that case was brought to set aside the decree of distribution entered in the estate of Sohler deceased, or so much of it as distributed one-eighth of the estate to one Reuss, who was fraudulently and falsely made one of the distributees upon the representation to the court by the widow, who was the executrix of the will, that he was a son of the decedent.

The will of the decedent left all the property to the widow, and the children were pretermitted heirs. In the probate pro-
156 ceedings the court held that the widow was entitled to only a one-half interest in the estate of the decedent, and that the children were entitled to equal parts of the other half. When the estate was ready for distribution the executrix in her petition set forth the names of the minor children of the decedent, and included Reuss as one of them. The fact was that Reuss was not a son of the decedent, but was a son of the executrix, and these two—mother and son—connived and conspired together to mislead and deceive the court into making its decree so that one-eighth of the property of the estate was distributed to Reuss in fraud of the rights of the minor children of the testator, for whom the executrix was the natural guardian.

It was urged against the sufficiency of the complaint setting up these facts, that it was the exclusive province of the court in probate to determine heirship and decree distribution, and that the complaint went no further than to charge intrinsic fraud in that Reuss succeeded by false and perjured evidence in obtaining a favorable decision upon a matter essential to the proceeding, and one in which the court was bound to exercise its judgment, and notwithstanding that the decision was obtained by such evidence, this fact afforded no ground for relief in equity. "If this were all the complaint discloses," said the Supreme Court, "the respondent's contention would be undoubtedly sound: for it is the general rule that intrinsic fraud, fraud by which a decree or judgment is obtained by false evidence upon issues within the case, is not such fraud as equity will relieve against, the theory being that the losing litigant has had his day in court, and that while it must always remain a misfortune that private causes shall be lost by foresworn testimony, yet stronger than
157 this consideration is that which declares it to be the policy of the law to make an end of litigation, and in the nature of things there never could be a final judgment if every judgment was open to avoidance upon the charge that fraudulent evidence had been introduced in its procurement. Therefore, it is the general rule that extrinsic fraud only will form the basis of such relief as is here sought,—extrinsic fraud consisting in the failure to give legal notice to the adversary, the prevention of him or his witnesses from attending the trial, and the like.

"But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of

these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent off-spring. She was under like obligation to disclose to the court, on their behalf and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar
158 force did this duty press upon her, in view of the fact that during all of this time she was executrix of, and administered upon, the estate through which her children were to derive their property. Such being her position, it was charged, that in violation of this duty, and of the rights of her minor children, she connived with her adult son—not an heir to the estate of the deceased—to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here certainly is a charge of concealment upon the part of the guardian, when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by conspiracy with her co-defendant, it is asserted she did not do, and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being prop-
159 erly represented at the hearing, or from being represented at all."

The Court concluded that the complaint presented a case for equitable relief, and that if the Superior Court found the facts to be as alleged that it would be its duty to decree that Reuss held the title to the property he had obtained from the estate, as trustee of the minor children, and that the court should compel Reuss to make conveyance and transfer to them such property, or if a conveyance of specific property could not be had, then to hold him accountable to the complainants for the value thereof.

The court refers to the allegations of the complaint as peculiar

and somewhat remarkable, and so indeed they are, and, as stated, they certainly call for the interposition of a court of equity, but the allegations of the complaint under consideration in this case, do not present a parallel state of facts. The executor in this case had no such relation to the complainant as the executrix had to the complainants in that case. The complainant in this case was not a minor and the executor was not his guardian, and, what is equally important, the complainant is not an heir of Thomas H. Williams, deceased, the distribution of whose estate is made the subject of attack in the bill of complaint.

These distinguishing characteristics deprive the Sohler case of its weight as an authority for this court in the present case.

In the Estate of Davis, 130 Cal. 590, one Laura E. Tracy, claiming to be the heir of Jacob Z. Davis, commenced an action in the Superior Court in which the probate proceedings of the estate had been conducted and the estate distributed. The complainant was not a party to such proceedings, and she alleged in her complaint, or
160 petition, that at the time Davis died, October 18, 1896, she was living in a foreign country and had no notice of his death or the proceedings connected with the probate of his will; that she did not know that he lived in San Francisco until after the 15th of September, 1899; that about said date she discovered that decedent was in truth and in fact a brother of her father; that thereafter, and upon May 1, 1900, she became cognizant of the fraud practiced upon her in the forgery of the will and the securing of its probate. The will was admitted to probate August 17, 1898, and the complaint or petition was filed September 7, 1900. The fraud upon which relief was sought was stated to be that the will was a forgery conceived and executed by the legatees thereunder and certain other conspirators; that it was probated upon perjured testimony and the jury which was empaneled to pass upon certain charges of forgery and conspiracy by contestants other than the complainant, at the time the will was offered for probate, was corrupted, and thereby caused to render a verdict against contestants and in favor of the validity of the document. To this complaint or petition a demurrer was interposed and sustained, and on appeal to the Supreme Court, it was contended by the attorney representing one interest that the proceeding was brought in the probate court to set aside the probate of the will by reason of the wrongs and frauds alleged in the petition. The attorney for the other interests contended that the proceeding had not been brought in a court of probate but that it was a proceeding in a court of equity seeking to establish a trust and charge the legatees under the will of Davis as trustees of the estate for the benefit of the complaint. The court considered the proceedings in both aspects and determined that the petition involved the probate juris-
161 diction of the Superior Court and that the petitioner was not entitled to relief. What the court said upon this subject is applicable to the present case.

"A proceeding relating to the probate of a will is essentially one *in rem*, and a statute providing for a constructive notice by publication of posting gives notice to the world. (Crall *v.* Poso Irrigation Dist., 87 Cal. 147.) Viewing this matter in the light of constitu-

tional law, it is not necessary that there should be a personal notice served upon any one. And conceding that portion of the statute relating to personal service of notice discriminative against known heirs not residents of the state, and even further conceding, for present purposes alone, that such discrimination renders the statute unconstitutional, as violative of the fourteenth amendment, still such concessions only affect the question of personal notice; and the law as to constructive notice still remains upon the statute-books entirely valid and effective, and by that notice this petitioner was notified of the hearing of the probate of the will in common with all other interested parties.

"It is next asserted that the statute providing for constructive notice is unconstitutional in this, that the ten days herein provided is too short to serve as constructive notice to the world, and *that the period of time being so short*, therefore the statute is unreasonable and consequently void. As before suggested, the proceeding as to the probate of a will is essentially one *in rem*, and in the very nature of things the state is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a
162 proceeding where it has absolute possession of the *res*. It would be an exceptional case where a court would declare a statute void, as depriving a party of his property without due process of law, the proceeding being strictly *in rem*, and the *res* within the state, upon the ground that the constructive notice prescribed by the statute was unreasonably short. It would seem that very few cases of that kind could be found in the books. Certainly this is not one of them. Public policy demands that a will shall have a speedy probate, and the legislature, recognizing that fact, has given the heir, by express enactment, one year after that probate has been decreed within which time he may attack the will. His rights are in no way concluded by the decree of probate. He has an entire year thereafter in which to attack the will, and he may attack it upon the same grounds and for the same reasons that he could attack it prior to its probate. Even the measure of evidence demanded of him for a successful attack is no different in the two cases."

With respect to the claim that the petition or complaint was a proceeding in a court of equity seeking to establish a trust, the court refers to Sohler *v.* Sohler *supra*, as the latest expression of the court bearing upon the power of equity to deal with a decree of distribution, but the court says: "That case, upon its facts, is an exceptional one," and then refers to the case of Mulcahey *v.* Dow, 131 Cal. 73, as dealing generally with the question. In other words, the court refers to this last case as declaring the law upon the subject. Turning to that case, we find it is similar, in its general features, to the complaint under consideration. The facts were these: Arthur
163 Waters died intestate in the City of San Francisco, leaving a wife here and a sister and nephews in other states. Administration was had upon his estate and in due time and after due notice, a decree of distribution was entered, which found that the wife, Elizabeth, was the only heir of her husband, and all his estate was, therefore, distributed to her. Subsequently she died and

the defendants in the case were her successors in interest. The plaintiffs in the case were a sister and a nephew and a niece of the decedent, claiming to be his heirs at law, and asserting that the wife, Elizabeth, under the decree of distribution held their respective shares of property as an involuntary trustee.

The plaintiffs were non-suited in the Superior Court. On appeal to the Supreme Court the question was as to the sufficiency of the evidence to support the judgment.

The court held in substance that a proceeding for the distribution of the estate of a deceased person is a proceeding *in rem*, and the decree of distribution binds all who have constructive notice thereof, and if not appealed from is conclusive as to the whole world, upon all questions of heirship; that where heirs are omitted from a decree of distribution, to enforce an involuntary trust against the distributees on the ground of fraud, if there is no showing of extrinsic or collateral fraud and no satisfactory showing of the existence of any fraud, the action cannot be maintained, and that the failure of the widow of the decedent to whom the estate was distributed to inform the relatives of her husband living in another state of the death of her husband is immaterial upon a charge of fraud; that no legal duty devolved upon her to furnish them with that information.

The case of Lynch *v.* Rooney, 112 Cal. 279, was similar to the last case, except that the ground there relied upon for equitable
164 relief was not fraud but mistake, and it was held that the decree of distribution was final and conclusive upon all questions of heirship. The Court said:

"It is insisted that the intervenors in asking this relief are not attacking the decree of distribution, but are asking relief thereunder. Many cases are cited to support this contention, but they fall short of the mark, and present no question similar to the one here involved. The court in hearing the petition for distribution of the estate of Bryan Lynch, deceased, upon legal and proper notice to the entire world, took evidence as to who were the heirs of his estate, entitled to take the same, and thereupon made a finding of fact that Catherine Clark was a sister and the only heir, and, as a conclusion of law, held that said Catherine Clark was entitled to the entire estate. That decree has never been modified, nor even assailed, and, as far as any collateral attack is concerned, it must stand forever as binding and conclusive upon the question of heirship. Whatever counsel may say as recognizing the validity of the decree, and claiming under it, is not strictly true, for that decree declares as a fact that Catherine Clark is the only heir of Bryan Lynch; and to give the intervenors the relief here sought, that finding must be first set aside as untrue, and that cannot be done in this action. If such a thing could be done the stability of judgments and decrees would be a thing of the past. Decrees of distribution would be as unstable as the sands, for omitted heirs from such decrees would be seeking to have involuntary trusts declared thereon at most inopportune times, and in direct opposition to the law as declared by section 1908 of the Code of Civil Procedure pertaining to the conclusiveness and finality of judgments and decrees."

165 The allegation of fraud or mistake attributed to Judge Williams in telling the complainant in 1893 that his wife had no interest in the estate of her deceased father, or property of any kind or character, and that she had left no property or estate whatever, does not alter the situation in the least. What Judge Williams said was at most merely the expression of an opinion. It was not the statement of a fact, and there is no confidential or fiduciary relation existing between Judge Williams and the complainant that justified the complainant in reposing confidence in the statement. Whether the wife of the complainant left any property from her father's estate in which the complainant had an inheritable interest, would still be a matter of opinion if at this time no decree of distribution of the estate had been entered.

But there was no extrinsic or collateral fraud in the statement of Judge Williams, in whatever light it may be viewed. If it has any bearing upon any question before the court it must be as evidence that the complainant had notice that proceedings with respect to the estate of Thomas H. Williams were pending in court and that it was his duty to make inquiry and ascertain what rights his late wife had in her father's estate, if he desired to assert a claim as heir to her estate or for the benefit of her estate.

The next question relates to the notice of the hearing in the Superior Court upon the petition for the settlement of the account of the executor and for distribution of the estate. The complainant contends that as to him the notice did not amount to due process of law.

The provisions of the Code of Civil Procedure with respect to the notice to be given in proceedings for the settlements of ac-
165 counts of executors or administrators, and for the final distribution of estates, are as follows:

"Sec. 1633. When any account is rendered for settlement, the court, or a judge thereof, must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing the notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper.

"Sec. 1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of the settlement must state those facts, which notice must be given by posting or publication, as the court may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice or proceedings."

Notice was given in accordance with the requirements of these sections. But it is contended that the notice was not sufficient to afford the complainant the protection guaranteed to him by the Constitution, and the case of Roller *v.* Holly, 176 U. S. 398 is cited as supporting complainant's contention. That action was brought in a

district court of Texas upon a promissory note to recover a personal judgment and for the foreclosure of a vendor's lien upon a tract of land in that state for the purchase of which the note sued upon was given in part payment. The defendant residing in Virginia was served with process in that state requiring him to appear and
167 answer the suit in Texas within five days. It was held that such notice was not a reasonable one and was not due process of law, but the action, although classified by the court under the statute as *in rem*, was *inter parties*. The law in such a case is clearly not applicable to the present controversy where the proceeding was with respect to the final account and distribution of an estate, a subject matter over which the court had exclusive jurisdiction.

"A proceeding to secure a decree of distribution is essentially a proceeding in the nature of one *in rem*. It has none of the characteristics of a proceeding *in personam*.

Mulcahy *v.* Dorr, 131 Cal. 73, 77.

In the William Hill Co. *v.* Lawler, 116 Cal. 359, the Supreme Court, in stating the effect of the constructive notice in such proceedings, says:

"By giving the notice directed by the statute, the entire world is called before the court and the court acquires jurisdiction over all persons for the purpose of determining their right to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim or fail to appear the action of the court is equally conclusive upon him, subject only to be reversed, set aside or modified on appeal. The decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court."

If in such proceeding the entire world is called before the court and to enable the court to enter a valid decree the entire world must have reasonable notice, it will necessarily follow that the notice that will bind all parties must be of such nature as could reach
168 the most distant possible party interested in the estate. To state the proposition is to show its absurdity. It would be impracticable, and, moreover, under such rule no decree would carry with it any presumption of validity, but rather, on the contrary, invite the presumption that it was invalid.

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitude to which they are subject. This is the foundation of all judicial proceedings *in rem*."

Case of Broderick's Will, 21 Wall. 503, 519.

In Bellingham Bay etc. Co. *v.* New Whatcom, 172 U. S. 314, 318, the Supreme Court of the United States was called upon to determine whether a notice of ten days of a re-assessment for street improvements, was sufficient under the constitutional guarantee of due pro-

cess of law. The Court said: It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time * * * But how many days can the courts fix as a minimum? How much time can be adjudged necessary as a matter of law for preparing and filing objection? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. *No hardship to a particular individual can invalidate*
169 *a general rule.*" It was accordingly held that ten days' time did not appear to be unreasonably short for presenting objections to the assessment.

The same rule applied to the present case determines that ten days' notice of the settlement of a final account and the distribution of an estate is not unreasonably short in ordinary cases, and the exceptional case does not change the general rule.

My opinion is that the bill of complaint does not present a case for the equitable jurisdiction of this court, and the demurrer will have to be sustained on that ground. It follows that, upon the facts stated, the bill of complaint cannot be amended to confer jurisdiction. The bill will be dismissed.

(Endorsed:) Filed May 21, 1906. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

170 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13592. In Equity.

GEORGE G. GOODRICH, Complainant,

vs.

JOHN W. FERRIS, FRANK HANSFORD JOHNSON, an Infant; FRANK S. JOHNSON, Guardian of the Estate of Frank Hansford Johnson; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, 2ND, an Infant; GEORGIE E. WILLIAMS, and JENNIE E. WILLIAMS, Respondents.

Petition for Appeal to the Supreme Court of the United States.

To the Honorable the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California:

The above named complainant, feeling himself aggrieved by the decree made and entered in this cause on the 11th day of October, 1906, does hereby appeal from said decree of said Circuit Court to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith; and he prays that this appeal may be allowed, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon

which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner further prays that a proper order be made touching the security to be required of *his* to perfect his appeal.

Dated, April 10th, 1907.

HENRY ARDEN, &
ALBERT M. JOHNSON, AND
HIRAM W. JOHNSON,
Solicitors for Complainant.

171 *Order Allowing Appeal.*

The above petition is hereby granted and the appeal is allowed, upon complainant's giving a bond, conditioned as required by law, in the sum of five hundred ($500.00) Dollars.

Dated, April 11th 1907.

W. C. VAN FLEET, *Judge.*

[Endorsed:] Filed April 11, 1907, Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

172 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13592. In Equity.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS, FRANK HANSFORD JOHNSON, an Infant; FRANK S. JOHNSON, Guardian of the Estate of Frank Hansford Johnson; THOMAS WILLIAMS, JR., THOMAS H. WILLIAMS, 2ND, an Infant; GEORGIE E. WILLIAMS, and JENNIE E. WILLIAMS, Respondents.

Assignment of Errors on Appeal from the Circuit Court to the Supreme Court of the United States.

The complainant prays an appeal from the final decree of this court to the Supreme Court of the United States, the said final decree of this court having been made and entered on the 11th day of October, 1906, in favor of respondents, and complainant assigns for error:

I.

That Sections 1633 and 1634 of the Code of Civil Procedure of the State of California are in contravention of the Constitution of the United States, and especially Section 1 of Article XIV. thereof; no day in court is allowed a party interested in any matter in which the proceedings are taken against him under the provisions of said sections, and no sufficient, proper, or legal notice to such party is prescribed of any proceedings against him in any such matter by either

of said sections; and the same do not provide for any such notice,
and do not constitute due process of law within the meaning
173 of Section 1 of Article XIV. of the Constitution of the United
States, and that the notice or notices provided for by said sections do not constitute due process of law within the meaning of said Section 1 of Article XIV. of the Constitution of the United States.

II.

That the notice of the hearing of the final account and the petition for distribution in the matter of the estate of Thomas H. Williams, deceased, referred to in the bill of complaint and in the opinion of the circuit court, were not and did not constitute due process of law within the meaning of Section 1 of Article XIV of the Constitution of the United States, and the complainant never had his day in court in said proceedings for distribution, and that the settlement and distribution of said estate were and are void, and that by reason of the proceedings had and taken by the defendants Thomas H. Williams, Jr., Frank Hansford Johnson, and Frank S. Johnson, guardian as aforesaid, in the matter of the settlement and distribution of the said estate, complainant has been deprived of his interest in the property of said Thomas H. Williams, deceased, without due process of law, within the meaning of Section 1 of Article XIV. of the Constitution of the United States.

III.

That defendants Frank Hansford Johnson, Frank S. Johnson, guardian of his estate, and Thomas H. Williams, Jr., became trustee for the complainant under the general principles of equity jurisprudence, and also under sections 2223 and 2224 of the Civil Code of the State of California; and the circuit court erred in holding otherwise;

IV.

That the trust attempted to be created by the will of
174 Thomas H. Williams, deceased, mentioned in the bill of
complaint and in the opinion of the circuit court, was and is in contravention of Sections 715, 716, 749 and 771 of the Civil Code of the State of California, and was and is void, and the circuit court erred in holding otherwise;

V.

That the Superior Court of the State of California, in and for the City and County of San Francisco, which decreed a settlement of the final account of the executor of the will of said Thomas H. Williams, deceased, and a final distribution of his estate, never acquired or possessed jurisdiction so to do, and the proceedings whereby it was sought to settle said account and distribute said estate were and are void, by reason of the fraud and concealment practised upon complainant by the defendant Frank Hansford Johnson through his guardian defendant Frank S. Johnson, and by defendant Thomas

H. Williams, Jr., and also, because the complainant was not made a party to the proceedings aforesaid, and had no notice thereof; and the circuit court erred in holding that such proceedings were valid;

VI.

That the proceedings in the matter of the estate of said Thomas H. Williams, deceased, in said Superior Court of California, were never revived as against the complainant, after the death of his wife (who was a daughter of said Thomas H. Williams, deceased, and one of his heirs at law), as provided in Sections 385 and 1713 of the Code of Civil Procedure of the State of California, and accordingly the same were and are void; and the circuit court erred in holding otherwise;

VII.

That the circuit court erred in holding that the notice at-
175 tempted to be given the complainant of the hearing of the final account of the executor of the will of said Thomas H. Williams, deceased, and his petition for distribution of said estate, which notice was given by posting only, was sufficient;

VIII.

That the circuit court erred in holding that the bill of complaint showed no extraneous or collateral fraud sufficient to avoid the decree settling the final account of the executor of the will of said Thomas H. Williams, deceased, and distributing his estate;

IX.

That the circuit court erred in refusing complainant leave to amend his bill of complaint;

X.

That the circuit court erred in sustaining the demurrer to the bill of complaint of the defendants, John W. Ferris, Thomas H. Williams, Jr., Georgie E. Williams, Jennie E. Williams, and Thomas H. Williams, 2nd;

XI.

That the circuit court erred in sustaining the demurrer to the bill of complaint of the defendant Frank Hansford Johnson, an infant, by Frank S. Johnson, his general guardian.

XII.

That the circuit court erred in sustaining the demurrer to the bill of complaint of the defendant Frank S. Johnson.

XIII.

That the circuit court erred is dismissing the complainant's bill of complaint.

XIV.

That the circuit court erred in holding, as in the opinion of the judge it is held, and was declared by the decree, that sections 1633 and 1634 of the Code of Civil Procedure of the State of Cali-
176 fornia are constitutional; that the notice therein prescribed is sufficient, and that complainant was a party to the probate proceedings aforesaid, and is bound by the decree of said superior court.

Wherefore, Complainant prays that said decree of the Circuit Court be reversed.

Dated April 10th, 1907.

HENRY ARDEN,
ALBERT M. JOHNSON, AND
HIRAM W. JOHNSON,
Solicitors for Complainant.

Filed April 11, 1907.
SOUTHARD HOFFMAN, *Clerk,*
By W. B. MALING,
Deputy Clerk.

177 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13592. In Equity.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS, FRANK HANSFORD JOHNSON, an Infant; FRANK S. JOHNSON, Guardian of the Estate of Frank Hansford Johnson; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, 2ND, an Infant; GEORGIE E. WILLIAMS, and JENNIE E. WILLIAMS, Respondents.

Bond on Appeal to the Supreme Court of the United States.

Whereas, on the 11th day of October, 1906, a judgment and decree was made and entered by the Circuit Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, in an action therein pending, wherein the above named George G. Goodrich was and is complainant, and the above named John W. Ferris, Frank Hansford Johnson, an Infant, Frank S. Johnson, guardian of the estate of said Frank Hansford Johnson, Thomas H. Williams, Jr., Thomas H. Williams, 2nd, an infant, Georgie E. Williams and Jennie E. Williams, were and are defendants and respondents; which judgment and decree was in favor of the respondents in said cause, dismissing the complainant's bill of complaint, and awarding costs to respondents,

And Whereas, the above named complainant, feeling himself aggrieved by said judgment and decree, has petitioned the said circuit court to be allowed to appeal to the Supreme Court of the United States from said judgment and decree of said circuit court, and that a citation issue in accordance with law, and has filed an assignment of the errors complained of in the record and proceedings;

Now Therefore, we, the undersigned, do hereby bind ourselves, our heirs, executors and administrators, jointly and severally,
178 firmly by these presents, in the sum of Five Hundred (500) Dollars (that being the amount of the bond fixed by the said circuit court in its order allowing said appeal) and undertake and promise on the part of the appellant, said complainant, that the said complainant will well and diligently prosecute the said appeal to effect in the said Supreme Court of the United States, and will, in all respects, comply with the laws in such cases made and provided, and will pay all costs that may be awarded against him, in the event that he shall fail to make his said appeal good, or said appeal be dismissed.

Dated, this 11th day of April, 1907.

[CORPORATE SEAL.]

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By H. V. D. JOHNS, *Attorney-in-Fact.*

Approved April 11, 1907.

W. C. VAN FLEET, *Judge.*

(Endorsed:) Filed April 11, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

179 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13592.

GEORGE G. GOODRICH, Complainant,
vs.
JOHN W. FERRIS ET AL., Defendants.

Certificate to Record on Appeal.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing one hundred and seventy-eight (178) pages, numbered from 1 to 178, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Circuit Court, and that the same constitutes the record on appeal to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript of record is $108.00, that said amount was paid by Albert M. Johnson, one of the solicitors for complainant, and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Circuit Court, this 5th day of June, A. D. 1907.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

180 UNITED STATES OF AMERICA. *ss:*

To John W. Ferris, Frank Hansford Johnson, an infant; Frank S. Johnson, guardian of the estate of Frank Hansford Johnson; Thomas H. Williams, Jr., Thomas H. Williams, 2d, an infant; Georgie E. Williams, and Jennie E. Williams, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the tenth day of June, A. D. 1907, pursuant to an order allowing appeal filed in the clerk's office of the Circuit Court of the United States, Ninth Judicial Circuit for the Northern District of California, wherein George G. Goodrich is appellant and you are appellees, to show cause, if any there be, why the judgment and decree in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William C. Van Fleet, Judge of the United States District Court in and for the Northern District of California, sitting as Judge of the Circuit Court of the United States, Ninth Circuit, Northern District of California, this 12th day of April, 1907, and of the Independence of the United States, the one hundred and thirty-first.

W. C. VAN FLEET,
Dist. Judge.

181 Service of within Citation, by copy, admitted this 12th day of April, A. D. 1907.

HENRY ACH,
Attorney for Defendants John W. Ferris, Individually and as Trustee; Thos. H. Williams, Jr., Thos. H. Williams, 2d, Georgie E. Williams, and Jennie E. Williams.

THOMAS, GERSTLE, FRICK & BEEDY,
J. W. DORSEY,
Surviving Member of the Firm of Bigelow & Dorsey,
Attorneys for Defendants Frank Hansford Johnson, an Infant; Frank S. Johnson, General Guardian, &c., and Frank S. Johnson.

[Endorsed:] R/L. 13592. In the Supreme Court of the United States. Geo. G. Goodrich *vs.* John W. Ferris *et al.* Citation. Filed April 13, 1907. Southard Hoffman, Clerk U. S. Circuit Court, Northern District of California.

Endorsed on cover: File No. 20,779. N. California C. C. U. S. Term No. 120. George G. Goodrich, appellant, *vs.* John W. Ferris, Frank Hansford Johnson, an infant; Frank S. Johnson, guardian of the estate of Frank Hansford Johnson, *et al.* Filed July 5th, 1907. File No. 20,779.

IN THE

Supreme Court of the United States.

October Term, 1908.

No. 120.

Office Supreme Court, U. S.
FILED.
MAR 2 1909
JAMES H. McKENNEY,
CLERK

GEORGE G. GOODRICH,

Appellant,

vs.

JOHN W. FERRIS, FRANK HANSFORD JOHNSON, an infant, FRANK S. JOHNSON, Guardian of the Estate of FRANK HANSFORD JOHNSON, THOS. H. WILLIAMS, Junior, THOMAS H. WILLIAMS, 2nd, an infant, GEORGIE E. WILLIAMS and JENNIE E. WILLIAMS,

Appellees.

Appeal from the Circuit Court of the United States for the Northern District of California.

BRIEF OF APPELLANT.

JOHN G. JOHNSON,
TYSON S. DINES,
L. SIDNEY CARRÈRE,
Of Counsel for Appellant.

HENRY ARDEN,
Solicitor for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 120.

GEORGE G. GOODRICH,
Appellant,

v.

JOHN W. FERRIS, *et al.*,
Appellees.

BRIEF FOR APPELLANT.

Statement.

On the 19th day of May, 1904, the appellant, George G. Goodrich, a citizen of the State of New York, residing in the City of New York, as complainant, filed his bill in equity against the respondents who were respectively trustees, devisees and heirs at law of one Thomas H. Williams, deceased, all citizens and residents of the State of California. This bill, and the amendment thereto allowed by the court, are set forth in full in the transcript of the Record, the original bill at pp. 1-52, and the amendment at pp. 65-70. For convenience of the court, however, we have placed the amendment in proper place in the

original bill and had the bill, as amended, printed in full in the appendix to this brief.

The bill, as amended, omitting formal parts, alleges:

1. Citizenship and residence of complainant and respondents.

2. That Thomas H. Williams, a resident and citizen of California, died February 28th, 1886, seized and possessed of a large amount of property situated in the Counties of San Joaquin, Sacramento, Solano, Contra Costa, Yule and in the City and County of San Francisco, all particularly described in the decree of distribution marked Exhibit C.

(Transcript Record, pp. 26-51).

3. That he left no wife him surviving and that his only heirs at law were his children and lawful issue, viz:

(a) Sherrod Williams, a son, who died August 2nd, 1888, leaving no wife or lawful issue, and whose heirs at law were Mary, Thomas Jr., Bryant and Percy, his sister and brothers.

(b) Thomas H. Williams, Jr., a son, who married Beatrice Steele in June, 1901, and who has a son of said marriage designated as Thomas H. Williams, 2nd, both father and son being parties respondent in this suit.

(c) Mary, Bryant Williams, intermarried with Frank S. Johnson, divorced from him December 29th, 1888, intermarried with George G. Goodrich, the complainant, December 7th, 1889, died October 3rd, 1893, leaving her surviving, her said husband, George G. Goodrich and a son of her former marriage, Frank Hansford Johnson, as her heirs at law.

(d) Percy Williams who married Bessie

L. Trahern Williams August 1st, 1888, and died October 3rd, 1890, leaving no child him surviving and leaving a will by which he devised and bequeathed all his estate to his widow, who survived him and who subsequently conveyed all said interest to Thomas H. Williams, Jr. who now claims to own it.

(e) Bryant Williams, who died May 2nd, 1893 unmarried and without lawful issue, leaving Mary Bryant Goodrich, a sister, and Thomas H. Williams, Jr., a brother, as his sole heirs at law.

4. That Thomas H. Williams, deceased, made and signed two papers purporting, respectively, to be his last will and codicil thereto, true copies of which were filed as Exhibits A and B of the Bill.

5. That the trust attempted to be created in said will was and is void under the laws of California, especially under Sections 715, 716, 771 and 749 of the Civil Code of California; that the absolute power of alienation of the property of said Thomas H. Williams was by said will suspended for the term of three years and not for a period measured by the continuance of lives in being; that as to the property included in said attempted trust, the said Thomas H. Williams died intestate and said property vested by reason thereof, at his death, in his said heirs at law.

6. That on the 6th day of April, 1886, said will and codicil were admitted to probate in the Probate Division of the Superior Court of the City and County of San Francisco and letters testamentary issued to George E. Williams, the executor and trustee named in the will; that he qualified as such executor and that, as such executor and testamentary trustee under said void trust, he took possession of said estate.

7. That said trustee entered upon the execution

of said void trust and carried on the business in which said deceased Thomas H. Williams had been engaged and continued in such execution until the 5th day of January, 1897, when the consent decree of distribution hereinafter referred to was made.

8. That on March 11th, 1889, Frank S. Johnson was appointed by order of the Superior Court of Marin County, California, guardian of the person and estate of Frank Hansford Johnson and qualified as such and from thence hitherto has been and now is such guardian.

9. That on the 1st day of August, 1896, said infant Frank Hansford Johnson, by petition to said Superior Court of Marin County, applied for leave to consent to a decree of distribution of said estate of Thomas H. Williams, deceased, the terms of which distribution had been previously agreed upon between said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his said guardian Frank S. Johnson, and said George E. Williams, testamentary trustee; and also for leave to consent to the appointment of appraisers to appraise said estate under the provisions of said void trust.

10. That in said petition the facts of the existence of complainant, George G. Goodrich and of his marriage to said Mary Bryant Johnson, the divorced wife of said Frank S. Johnson, and of his interest in said estate, were fraudulently concealed from said Marin County Court; that the existence of said complainant his said marriage and his said interest were well known to the petitioner Frank Hansford Johnson, and to said Frank S. Johnson, his guardian and to said George E. Williams and Thomas H. Williams, Jr., who were the only parties to said petition; that the said Frank Hansford Johnson, through his said guardian Frank S. Johnson, did with intend to deceive said Court, lead the Court to be-

lieve that the only persons interested in said estate were said infant, Frank Hansford Johnson, the said defendant Thomas H. Williams, Jr., and the said testamentary trustee, George E. Williams

11. That at the time of making said application to said court the said Frank Hansford Johnson, through his guardian Frank S. Johnson, well knew that said trust was void at its creation and that the consent decree of distribution to which said minor asked leave to consent, would work great injury to and defeat the rights of said complainant to his share of the property embraced in said void trust and that he well knew that there were questions of law and fact which in good conscience should have been submitted to and determined by the said court of Marin County before said minor should be permitted to consent to any distribution of said property by consent, decree or otherwise.

12. That, before said petition to the Marin County Court was filed, an agreement had been made between said Thomas H. Williams, Jr., and said minor, through his guardian Frank S. Johnson, and consented to by said George E. Williams, that said questions of law and fact should be concealed and kept from said court and said consent decree of distribution, as in the petition of said infant was fully described, should be granted upon consent by the Probate Division of the Superior Court of San Francisco, so that they might wrongfully and fraudulently obtain all of said estate of said deceased to themselves and thereby wrongfully and fraudulently deprive complainant of his legal share thereof. That thereupon and on the said first day of August, 1896, the said Superior Court of Marin County made a decree permitting said minor, through said guardian, to give such consent.

13. That complainant had no notice or knowl-

edge of said proceeding or decree in said Court of Marin County, until November, 1903.

14. That on the 7th day of August, 1896, the said Thomas H. Williams, Jr., filed his petition in the Superior Court of San Francisco, Probate Division, asking for appointment of appraisers of said estate pursuant to the terms of said void trust, contained in said will, particularly subdivision fourth of Item 4 thereof, which said petition was subscribed and sworn to by said Thomas H. Williams, Jr., on August 14th, 1896.

15 That in said petition the fact of the marriage of complainant to Mary Bryant Johnson, born Williams, was fraudulently concealed from the court, and complainant's name or existence were nowhere named therein; that said sworn petition falsely and fraudulenty, with intent to deceive said court, represented to said court that George E. Williams, the executor and trustee under said will, Frank Hansford Johnson, the minor, and said Thomas H. Williams, Jr., were the only persons then living interested in the distribution of said estate, whereas the said petitioner, Thomas H. Williams, Jr., at the time of making said petition, well knew, and the said George E. Williams, Frank Hansford Johnson and Frank S. Johnson, and each of them, well knew of the marriage of complainant with the said Mary Bryant Johnson, born Williams, daughter of said deceased Thomas H. Williams, and divorced wife of the said Frank S. Johnson and mother of said Frank Hansford Johnson, and well knew that the complainant was one of her heirs at law and was entitled, as such, to a distributive share of said estate, whether said trust was void or whether it was lawful and good.

16. That upon the presentation of said petition for appraisers the court directed notice to be given to said George E. Williams, Frank Hansford Johnson and his guardian, Frank S. John-

son, and to no one else, to show cause at a certain time and place why the prayer of said petition should not be granted; that at the hearing said parties, and said parties only appeared, and complainant, Goodrich, was not a party thereto, and had no notice or knowledge thereof, and did not appear.

17. That, on the 12th day of August, 1896, the date fixed for said hearing, the said George E. Williams, as executor of said will and trustee thereunder appeared in his own proper person, and Frank Hansford Johnson, and his guardian Frank S. Johnson, also appeared by their attorneys and they all consented in open court to an order appointing appraisers, and the court, upon such consent, made said order, under the provisions of said void trust appointing such appraisers August 12th, 1896.

18. That the appraisers appointed under said consent order, and pursuant thereto, appraised the property of the estate in the hands of said George E. Williams, as testamentary trustee, under said void trust, at the sum of $1,465,800.08, the real estate being $1,459,445.08 and personalty $6,355.00; which said report of appraisers was filed in said court; that the interest of complainant, Goodrich, therein is more than $5,000.00.

19. That on the 15th day of December, 1896, the respondent Thomas H. Williams, Jr., filed in said Superior Court of the City and County of San Francisco, his petition, upon oath, as beneficiary under said void trust, for final distribution of the estate embraced in said void trust. That at the same time, December 15th, 1896, the said George E. Williams also presented and filed his final account and report of administration of said estate, together with his sworn petition for settlement of said account, and final distribution of said estate; that in all of said petition and proceedings, the fact of the existence of complainant, George G.

Goodrich, and of his marriage to the said Mary Bryant Johnson (born Williams), the divorced wife of said Frank S. Johnson, and the fact of the interest of said complainant in said estate, were by said Thomas H. Williams, Jr. and the said George E. Williams fraudulently concealed from said court with intent to deceive said court, although all of said facts were well known to both of said petitioners and each of them.

20. That said petitioners, with like intent, did in said petitions, wrongfully and fraudulently inform the court that the only persons interested in said estate, or in the distribution thereof, were the petitioners Thomas H. Williams, Jr., and said Frank Hansford Johnson and said George E. Williams, the testamentary trustee; that at the time of making said petitions, the said parties, and each of them, well knew that said trust was void in its creation, and that the consent decrees of distribution, for which they applied to said Probate Court, would work great injury to and defeat the rights of complainant in said trust property; and that they well knew that there were difficult questions of law and fact which in good conscience should have been submitted to and determined by the Court before distribution of said property by consent decree or otherwise.

21. That, before said petitions were made or filed, the agreement aforementioned had been made between said Thomas H. Williams, Jr. and Frank Hansford Johnson, acting through his guardian, Frank S. Johnson, that the property embraced in said void trust should be wrongfully and fraudulently distributed as in and by said consent decree of distribution done, which said agreement was known and consented to by said George E. Williams, trustee.

22. That it was also agreed between them that said questions of law and fact should be concealed and kept from said court and said consent decree

so made that they might wrongfully and fraudulently deprive complainant of his legal share thereof.

23. That in the said petition of said George E. Williams, for the distribution of said estate of said Thomas H. Williams, deceased, the said George E. Williams stated, among other things, as follows, to-wit.:

'That numerous controversies have heretofore existed between Thomas H. Williams, Jr., hereinbefore named and Frank S. Johnson, the guardian of Frank Hansford Johnson, a minor, and that no other persons are interested in the distribution of the estate belonging to the deceased testator, except your petitioner, said Frank H. Johnson and Thomas H. Williams, Jr. * * *

'That the said Frank S. Johnson, guardian as aforesaid, and the said Thomas H. Williams, Jr., have agreed upon an amicable settlement of all disputes between them and the said Frank S. Johnson has due and legal authority to enter into and to consent to such settlement in the distribution of the estate of Thomas H. Williams deceased.' "

24. That in said petition of Frank S. Johnson, as guardian of the estate of said Frank Hansford Johnson, the said Frank S. Johnson stated, among other things, as follows:

"That all of the children of the said Thomas H. Williams named in said will, excepting Thomas H. and Mary, have died without issue, and that Mary, the daughter of said Thomas H. Williams, mentioned in said will, has died leaving one child, the said minor, who is the sole issue of said Mary and your petitioner, who were husband and wife.'

"That complainant is informed and believes and upon such information and belief alleges, that the said allegation was made for the purpose of inducing the court to which said petition was presented to believe and by the same the said court

was induced to believe that the said petitioner, said respondent Frank S. Johnson, was the husband of said Mary Williams at the time of her death.

25. That in said petition of said Frank S. Johnson, in behalf of his ward, said Frank H. Johnson, the said petitioner, stated also the following:

"That many questions have arisen, followed by controversies, between your petitioner, representing said minor, and Thomas H. Williams, Jr., the surviving son and only child living of said Thomas H. Williams, deceased, and who is over the age of 21 years, in relation to the distributive share of said minor of the properties of said estate. That the settlement of such questions and controversies through the courts involves the determination of many intricate, difficult and unsettled questions of testamentary construction and of facts, and will require the expenditure of large sums of money and great delay in the settlement of said estate. That, as your petitioner is informed and believes, it is for the best interests of the estate of said minor to make an equitable settlement and adjustment of all differences between said minor and the said Thomas H. Williams, Jr., relating to the distribution of said estate, and accordingly your petitioner, under the advice of counsel, and subject to the approval of this court, has on behalf of said minor agreed with Thomas H. Williams, Jr., to settle all matters of doubtful construction of said will and all questions and matters of difference between them in relation to said estate, and the properties thereof * * * ."

26. That in said petition of said Thomas H. Williams, Jr., for the distribution of the estate of said Thomas H. Williams, deceased, the said Thomas H. Williams, Jr., stated, among other things, the following:

'That prior to the filing of this petition, your

petitioner and said Frank Hansford Johnson, acting by and through his guardian, as aforesaid, Frank S. Johnson, and the said George E. Williams, have fairly, thoroughly and in detail agreed upon what property shall be set apart and distributed to George E. Williams, for the benefit of your petitioner during his life, as provided in said will, and what part and portion of said property shall be distributed to said Frank Hansford Johnson in fee and what property shall be distributed to your petitioner in fee under the terms of said will. That your petitioner and said Frank H. Johnson and said George E. Williams are the only persons interested in said estate."

27. That said Thomas H. Williams, Jr., also stated in his said petition the following:

"Your petitioner further represents that prior to the appointment of appraisers herein as hereinbefore recited, on the 12th day of August, 1896, a controversy had arisen between your petitioner and Frank S. Johnson, the said guardian of Frank Hansford Johnson, in regard to the method in which the property of the estate of said deceased testator should be distributed. That a settlement of said controversy through the courts involved the determination of many intricate, difficult and unsettled matters of testamentary construction, and of fact, and would require the expenditure of large sums of money and great delay in the settlement of said estate, and that the said parties in interest have, subject to the approval of this court, amicably and equitably settled and adjusted all difficulties between them, and that said Frank S. Johnson, as the guardian of said minor, has obtained from the Superior Court of Marin County, State of California, having jurisdiction of the estate of said Frank Hansford Johnson, a minor, due and legal authority to enter into and to consent to such settlement and to the distribution of said estate of Thomas H. Williams, deceased, hereinbefore prayed for. * * * That

in order to carry such settlement into effect your petitioner has yielded to said Frank Hansford Johnson such a proportion of said estate claimed by your petitioner in fee as would insure to said Frank Hansford Johnson, and to said George E. Williams, trustee, any and all amounts that might be claimed by them respectively under any construction of said will or under any settlement of the disputed questions of fact."

28. That the said allegations of respondents, Frank S. Johnson and Thomas H. Williams, Jr., and Geo. E. Williams, in their said petitions, were made for the purpose and with the intent of inducing the said probate court to withhold its consideration and determination of said questions of law, and in order to prevent the submission of the same to the said probate court and to void a consideration of same by said court.

29. That relying upon the said allegations contained in said petitions, that the said minor and said Thomas H. Williams, Jr., were the only persons interested in the distribution of the estate of said Thomas H. Williams, deceased, and that they had made an agreement respecting the distribution of the property of said estate which they desired the court to carry into effect by a consent decree, the said probate court was induced to believe and did believe that said minor and said Thomas H. Williams, Jr., were the only persons interested in the said estate and the only persons concerned in the distribution thereof, and that their agreement was operative to settle and adjust their respective rights and differences and to distribute said estate lawfully, and the court did thereupon, pursuant to said petitions and in accordance with said agreement, make the said consent decree of distribution, but in so doing the said court being imposed upon by said allegations in said petitions and relying thereon, as aforesaid, and believing that the said Thomas H. Williams,

Jr. and said Frank Hansford Johnson were the only persons interested in said estate, and that their agreement made as aforesaid operated to settle and adjust their respective rights and differences, and to distribute said estate among all the persons interested in said estate, did not consider any of said questions of law or fact and the same were never presented to said court, and they were never adjudicated upon, and none of them was ever adjudicated or determined.

30. That among the questions of law referred to in the allegations of said petitions, concerning which questions controversies had arisen between the parties, was the question of the true construction of said will of said Thomas H. Williams, deceased; and that all said parties knew that the trust attempted to be created by said will was void for the reasons hereinbefore stated and that, as to the real property comprising the estate of said Thomas H. Williams, deceased, he had died intestate; and that if said questions were submitted to said probate court, the determination thereof could not be otherwise than that the said trust was void and that said decedent had died intestate, and that the complainant was entitled to a distributive share of said estate.

31. That the said allegations of said petition of respondent Frank S. Johnson, guardian, was made with intent to deceive said court of Marin County into the belief that no person was interested in said matter other than said minor and his guardian and by reason thereof to withold notice to complainant of such petition and said agreement; and said court being misled and deceived by said petition and the representations therein made, as aforesaid, that no person other than said minor and his guardian was interested in said matter, omitted to give any notice of the hearing of said petition of said guardian, but granted same *ex parte* upon the faith of said petition and

a written consent purporting to be by all persons interested signed by respondents Frank S. Johnson, Thomas H. Williams, Jr. and said George E. Williams.

That by reason of the said petitions, the petitioner made it appear to said probate court that all persons interested in the estate of said Thomas H. Williams, deceased, had consented to an agreement, providing for the distribution of and effectual to distribute finally said estate and that, because of such consent and agreement of all persons interested in said estate, it would not be necessary for the said court to consider or determine any of the questions of law and fact which it was stated in said petitions had arisen among respondents (including the question of the construction of said will of said Thomas H. Williams, deceased, and the validity of the trust created thereby); and, therefore, upon the hearing of said petitions for distribution, the said court did so believe, and by reason of such belief, it was induced to and did forbear and refrain from all inquiry into and consideration of such questions of law and fact, and upon such hearing no testimony was taken, none of such questions were discussed, no evidence submitted thereon, except said petitions themselves and said agreement, no argument was had upon any of said questions, none of them was contested, and the merits of the controversies that had arisen upon such questions, as stated in said petitions, were not inquired into or considered at all, but, upon the representations made in said petitions, as aforesaid, and the same representations which were again made by said respondents Johnson and Thomas H. Williams, Jr., and said George E. Williams, at the hearing of said petitions, that all such matters and things had been settled by agreement, the said probate court, upon their application, made said decree, but only as a consent decree to record and carry into effect the said agreement of said George E. Williams and respondents John-

son and Thomas H. Williams, Jr. and not otherwise.

32. That by reason of the representations and declarations of said George E. Williams, made in 1893 to complainant, as hereinbefore alleged, he was induced to believe, and he did believe, until November, 1903, that his wife, said Mary Williams Goodrich, had left no property or estate whatever, and that her interest in the estate of her father, said Thomas H. Williams, ceased with her death.

That said George E. Williams was by profession an attorney at law of many years practice, and of great experience, and for a number of years he was a judge of the Superior Court of the State of California. Complainant is not a lawyer, never was, and knew nothing of the laws of California. Complainant knew nothing about the will of Thomas H. Williams, deceased, was not familiar with its terms and was not aware of the nature or extent of the provisions it made for his wife. All he knew was that his wife, during their married life, was receiving money from her father's estate in California. How much she was thus receiving and had received complainant did not know, and during all their married life, they lived in New York City where complainant has resided for twenty years last past. That the lands described in said decree of distribution are not of a fluctuating value. They are worth now no more than they were when respondents acquired possession and control of them as herein alleged. No improvements of great value or consequence have been made upon them, and respondents are now in possession of them, as herein alleged, and the rents, issues and profits of such lands since respondents obtained them, as aforesaid, have largely exceeded in value and amount any moneys expended by respondents for taxes, insurance, repairs or betterments or improvements of any kinds.

33. That in consequence of the concealments from, and false representations made to, the court as aforesaid, and in consequence of said consents as aforesaid, the said Superior Court of the City and County of San Francisco did, in said proceeding entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," on or about the 5th day of January, 1897, render the consent decree of distribution aforesaid, which said decree was entered and recorded in said matter of said estate in the office of the clerk of the City and County of San Francisco, on the 5th day of January, 1897, and that a true copy of said decree of distribution, marked, "Exhibit C," is annexed to this bill of complaint, as a part of this bill as fully as if embodied therein.

34. That complainant was never made a party to the said proceeding in said probate court entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," in which the said will and codicil thereto were probated, or to any proceedings in the administration of said estate in said matter; that said proceedings have not been revived or continued as against him, since the death of his said wife, as required by Section 385 and 1713 of the Code of Civil Procedure of the State of California, or otherwise, and that he is not and never has been a party thereto, and had no notice or knowledge thereof; and that he had no notice or knowledge of any of the proceedings therein mentioned for the distribution of said estate; or of the action or decree of the court thereon; and that in said proceedings for said final decree of distribution, no day is, or was, or has been given to complainant and that his first knowledge of any thereof, was in November, 1903.

35. That before the hearing upon the petitions for final distribution aforesaid, said decree of distribution had been prepared by and agreed to by and between said minor, Frank Hansford Johnson, through his guardian said Frank S. Johnson,

and said George E. Williams, executor and testamentary trustee of said void trust, and said Thomas H. Williams, Jr., and had been and was consented to by each of them, and that by force of said decree the whole of said real estate of said Thomas H. Williams, then remaining in the hands of said George E. Williams, executor and testamentary trustee of said void trust, was wrongfully and fraudulently divided and distributed as follows: 40 per cent. thereof to said infant Frank Hansford Johnson, in fee, 26 and ⅔ per cent. thereof to said defendant Thomas H. Williams, Jr., in fee and 33 and ⅓ per cent. thereof was decreed to remain in the hands of said George E. Williams, testamentary trustee under said void trust, for the benefit of said Thomas H. Williams, Jr., during his life, as provided in said will, and thereafter in accordance with said void trust.

36. That said decree was obtained by fraud, concealment from and deception upon the court, and by the unlawful confederation, connivance, collusion and consent on the part of said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his guardian said Frank S. Johnson, and said George E. Williams, aforesaid; that the court had no jurisdiction to distribute said estate under the terms of said void trust, as the same was void in its creation; and that, as to the said trust property, the testator died intestate, as aforesaid, and it passed to and vested in his heirs at law at the time of his death and to the heirs at law of said Percy, Sherrod, Bryant and Mary respectively, as they severally died, as before mentioned; and that the concealment of complainant's existence and interest in the estate was fraud upon the court. That the said consents were a fraud upon the court; that the said fraudulent concealment and fraudulent impression upon and false representation to the court, in obtaining said consent decree of distribution of the property embraced within said void trust, were by them

used, made, done and perpetrated with the intent wrongfully to defeat complainant of his right as heir at law in the real estate of his said deceased wife.

37. That said defendants Frank Hansford Johnson, through his guardian Frank S. Johnson, and Thomas H. Williams, Jr., pretended that said decree of distribution was fairly and properly obtained; and that said trust was valid under the laws of the State of California; and that a day was given, in said proceedings, to obtain said decree of distribution, to complainant to show cause against the same; and that complainant is not entitled to attack the validity of said decree or the validity of said trust; or to obtain relief as against their fraudulent acts aforesaid; whereas complainant charges the contrary thereof to be true; and that said trust should be declared void; and that said consent decree of distribution should be adjudged by this court to be nothing more than an agreement between said consenting parties thereto, namely, the said defendants Thomas H. Williams, Jr. and Frank Hansford Johnson and said George E. Williams, testamentary trustee, for the fraudulent division, among themselves, of the share of the said real estate belonging to complainant; and complainant expressly charges that the said alleged trust is void, and was void in its creation, and that as to the property involved in said trust said Thomas H. Williams died intestate and that under the circumstances aforesaid, the said defendants Thomas H. Williams, Jr., Frank Hansford Johnson and John W. Ferris, as successor to George E. Williams, trustee, became and are, by reason of the wrongful and fraudulent acts aforesaid, and by reason of the invalidity of said void trust, the trustees for complainant of the share of the real estate of said Thomas H. Williams deceased, described in said consent decree of distribution to which complainant was and is entitled as aforesaid.

38. That complainant not being a party to, and having no notice or knowledge of, the said probate proceedings in which said decree of distribution was made, could not appeal therefrom, and that his only remedy to set aside said decree and obtain relief herein prayed for, is by the inter position of a court of equity, and that under the laws of the State of California, the said probate division of the said Superior Court has and had no jurisdiction in that behalf.

39. That the said George E. Williams, trustee as aforesaid, departed this life on or about December 17th, 1899; and that thereafter an action was brought in the Superior Court of the City and County of San Francisco, State of California, wherein Thomas H. Williams, Jr., was plaintiff and Frank Hansford Johnson, a minor, Frank S. Johnson, guardian of the person and estate of said Frank Hansford Johnson, Frank S. Johnson, Jennie R. Williams, Executrix of the last will and testament of said George E. Williams, deceased, and Georgie E. Williams were defendants, and that such proceedings were had in said action; that on the 21st day of May, 1900, a decree was made by said court appointing the defendant John W. Ferris trustee of said void trust, in the place and stead of said George E. Williams, deceased.

40. That complainant was never made a party to said last mentioned action, in which said John W. Ferris was appointed such trustee, as aforesaid, and he is not and never has been a party thereto, and had no knowledge of, or notice of the bringing or prosecution of said action, or the proceedings therein or any of them, or of the action or decree of the court thereon; and further that said Thomas H. Williams, Jr., and said Frank Hansford Johnson and said Frank S. Johnson, guardian as aforesaid, parties to said action, did at the hearing thereof, fraudulently represent to said court in which said action was pending, that said Thomas H. Williams, Jr., said Frank Hans-

ford Johnson and Jennie R. Williams, and Georgie E. Williams were the only persons interested in said estate, of Thomas H. Williams, deceased, and that said Thomas H. Williams, Jr., and Frank Hansford Johnson, and each of them, did fraudulently conceal from said court the existence of complainant and his marriage to Mary B. Johnson, and his interest in said estate, and that at said time and at all times during the pendency of said action, said Thomas H. Williams, Jr., Frank Hansford Johnson through said Frank S. Johnson, guardian as aforesaid, parties to said action, well knew complainant's existence; and well knew that he had the interest aforesaid in the said estate of Thomas H. Williams, deceased; and well knew of the marriage of said Mary B. Johnson with him; and well knew that the said trust was void at its creation aforesaid. That in consequence of said false representations and fraudulent concealments, and upon the consent of the parties to said action, the said Superior Court made the decree aforesaid appointing said John W. Ferris trustee of said void trust in the place and stead of George E. Williams, deceased, as by said decree and proceedings in said action on file and of record in said action in the office of the clerk of the City and County of San Francisco, reference being thereunto had, will more fully appear. And complainant further shows that he had no notice of said last mentioned action, or of the decree of the said court therein, until November, 1903. That said John W. Ferris duly qualified as such trustee and gave the bond required by said decree and took possession of and still retains possession of the 33 and ⅓ per cent. of the property distributed under said consent decree of distribution aforesaid, and which, by the terms of said decree, was left in the hands of said George E. Williams, as trustee, for the purpose of said void trust.

41. That under the laws of the State of Cali-

fornia, and particularly under Section 2224 of the Civil Code, the said Thomas H. Williams, Jr., and said minor Frank Hansford Johnson and said John W. Ferris, testamentary trustee (by reason of the fraudulent and wrongful acts and concealments of said Thomas H. Williams, Jr., and Frank Hansford Johnson, as aforesaid, and the invalidity of said void trust, as aforesaid), became and are trustees for complainant of the share of said real estate described in said decree of distribution, belonging to complainant as aforesaid, and wrongfully and fraudulently gained by said Thomas H. Williams, Jr., Frank Hansford Johnson and George E. Williams, trustee, and distributed among them by the fraudulent and consent decree of distribution under said void trust as aforesaid.

42. That although the facts of the existence of complainant, that he was a citizen of New York State, and resided in the City of New York, were well known to the defendant Thomas H. Williams, Jr., Frank Hansford Johnson, through his said guardian, and said George E. Williams; and although complainant was entitled to reasonable and sufficient notice of the proceedings about to be taken by them, said defendants as aforesaid, for the distribution of said estate, they did, in order the more effectually to accomplish their said fraudulent purposes and design, and in order to obtain an apparent jurisdiction over complainant, obtain from said Superior Court of the City and County of San Francisco, upon the filing of their said petitions for distribution, orders purporting to fix the 26th day of December, 1896, for the hearing of said petitions and directing that notice thereof be given by posting the same in three public places in said City and County of San Francisco. That, pursuant to said order, notices were posted in three places in said City and County, to-wit.: one at the public Morgue, one at the place where the said court was held, and one at the United States Court building; but said no-

tices did not specify the true time fixed, as aforesaid, for such hearing, nor did either of them; that said posting was, by said order, directed to be made ten days before the said day fixed for the hearing of said petitions for distribution.

43. That the said period of ten days was an insufficient time for complainant, who resided in New York, to have by any possibility obtained knowledge of said notices and to have prepared for the hearing of said proceedings for distribution, and that said notices and the proceedings had in pursuance thereof were not, and did not constitute due process of law within the meaning of Section 1, of Article XIV, of the Constitution of the United States, and complainant never had his day in court in said proceedings for distribution, and the same as to him were and are void, and complainant, therefore, avers that by reason of the proceedings had, and taken by the defendants said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his guardian, said Frank S. Johnson, and the said George E. Williams, as aforesaid, in the matter of the distribution of said estate of said Thomas H. Williams, deceased, complainant has been deprived of his said interest in said real property of said decedent without due process of law, within the meaning of Section 1 of said Article XIV of the Constitution of the United States.

44. That, immediately upon the making of said decree of distribution, "In the Matter of the Estate of said Thomas H. Williams, deceased," the defendants Thomas H. Williams, Jr. and Frank Hansford Johnson, and the said George E. Williams, trustee, as aforesaid, severally took possession of the property set apart to them respectively by said decree of distribution, and the said defendants Thomas H. Williams, Jr., and Frank Hansford Johnson, have ever since then retained, and do yet hold possession of the property set apart

to them respectively as aforesaid by said decree of distribution; and have received and collected the rents, issues and profits thereof, all of which they have appropriated to their own use; that such rents, issues and profits aggregate a large amount of money, the precise amount of which complainant, having no means of ascertaining the same, is unable to state and seeks discovery thereof.

45. That the said George E. Williams, trustee, continued to hold and retain until his death, as aforesaid, the possession of the 33 and 1/3 per cent. of said estate awarded to him by said decree of distribution, and that after his death the same passed into the possession of the defendant John W. Ferris, trustee as aforesaid, as the successor to the said George E. Williams as such trustee, and the defendant John W. Ferris, trustee, still retains and holds the same and during all that time has received the rents, issues and profits thereof, of the times and amount of which complainant seeks discovery; that by reason of the taking and retention by the defendant Thomas H. Williams, Jr., and Frank Hansford Johnson and the said George E. Williams, trustee as aforesaid, and after his death by the defendant John W. Ferris, acting as his successor, of that portion of the said property to which complainant is entitled, as aforesaid, under the fraudulent acts and circumstances as aforesaid, and by reason of the invalidity of said trust, as aforesaid, the defendants Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams became, and they the said defendants, and said defendant John W. Ferris, trustee, are now the trustees for complainant of the property, as aforesaid, to which complainant is entitled, as herein alleged, under the general principles of equity jurisprudence, and also under the provisions of the statutes of the State of California, commonly known as the Civil Code of said State and Sections 2223 and 2224 thereof.

46. That in and by the provisions of the Statute of the State of California commonly known and called the Code of Civil Procedure of said State, and by Section 1633 thereof it is provided as follows:

'When any account is rendered for settlement the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of the settlement, the court, or a judge thereof, should deem the notice insufficient from any cause he may order such further notice to be given as may seem to him proper."

47. That by Section 1634 of said Code, it is provided as follows:

"When settlement is final, notice must so state, if the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings."

48. That the account alleged to have been filed in said Superior Court of the City and County of San Francisco, Probate Division, in the proceedings entitled "In the Matter of the Estate of Thomas H. Williams, deceased" on the 15th day of December, 1896, was an account filed for a final settlement of said estate; and the petitions for distribution of said estate filed by said George E. Williams, executor, and the defendant Thomas H. Williams, Jr., were filed by them, and each of

them, for a final distribution of said estate, and the report hereinbefore referred to as having been filed by said executor on said 15th day of December, 1896, was filed as and for his final report of his administration of said estate; that under and by the provisions of said sections of said statute, as hereinbefore recited, it is provided that the notice to be given of the hearing to be had on such settlement of said final account, and of such petitions for final distribution, must be given by posting or publication at least ten days prior to the day of settlement.

49. That the said statute further provides that upon the final hearing at the time appointed for such settlement, the court or the judge thereof, if he deem the notice given to be insufficient from any cause, may order such further notice to be given as may seem to him proper and as provided in and by the terms of said Section 1633.

That pursuant to the section last above mentioned of said Code of Civil Procedure of said State, the said Superior Court of the City and County of San Francisco in said proceeding made an order directing that notice of the settlement of said final account and of the hearing of said petitions for distribution, be given by the posting of notices in three public places in said City and County of San Francisco, and that such posting should be made ten days before the date fixed as aforesaid, for the settlement of said final account and the hearing of said petitions for final distribution. That the time as fixed by said order of court was the minimum time allowed by the provisions of said Code of Civil Procedure, to-wit, ten days. That by reason of the fraudulent concealment of the existence of complainant, and of the fact that he resided in and was a citizen of the State of New York, and of the fact that he was entitled to a distributive share of the estate of said Thomas H. Williams, deceased, whether the said trust were void or valid, and also by reason

of the false and fraudulent representations to said court made as aforesaid by defendants Thomas H. Williams, Jr. and Frank Hansford Johnson and said George E. Williams, the said court was imposed upon and led to believe, and did believe, that there were no persons interested in said estate other than the said Thomas H. Williams, Jr., and Frank Hansford Johnson, and said George E. Williams, and by such inducements the minimum time was fixed as aforesaid by said court for the giving of such notice, when in fact and in truth the time as thus fixed was not a reasonable time of notice, and did not, and could not, give to complainant any notice of the said proceedings, or any of them, and did not, and could not, afford him any opportunity to appear in said matter or to be heard therein; that upon the final hearing, at the time of such settlement, the defendants Thomas H. Williams, Jr., and Frank Hansford Johnson, through said guardian, and said George E. Williams, continued such concealment and said fraudulent misrepresentations to said court, otherwise said court would have deemed said notices insufficient and would have ordered further and other notice to be given complainant.

50. That complainant has not been in the State of California at any time since the death of his wife as aforesaid, except for a few days immediately after her death, when he brought her remains to San Francisco for interment. While in San Francisco the said George E. Williams declared to complainant that his said wife had no interest in the estate of her deceased father, or property of any kind or character whatever, and that she left no estate; and complainant thereupon returned to his residence in the State of New York. That at the time of the death of his said wife, she was indebted to a firm of jewelers in the City of New York to the amount of several thousand dollars and the creditor demanded payment of said indebtedness from complainant. That

when in San Francisco, complainant informed said George E. Williams of these facts and inquired of him whether the said wife of complainant had left any property or estate available for the payment of said demand, and the said George E. Williams assured complainant, and represented, stated and declared to him, that she had left no property or estate whatever, and complainant believed and relied upon the representations, declarations and statements of said George E. Williams, as aforesaid, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife, and being so induced he did, thereafter, abstain from any such inquiry and he knew nothing at all of the fact that he was entitled to any property as heir at law of his deceased wife, or under the said will of Thomas H. Williams, deceased, until the month of November, 1903, when, in the City of New York, his attention was first called to said matter by a stranger who, while in California pursuing an investigation not at complainant's instance, and not concerning him or his interest, had himself discovered the fact that complainant was entitled as aforesaid, whereupon complainant took steps at once to ascertain the facts connected with his interest in said property, as hereinbefore stated, and retained counsel to prosecute the necessary inquiries relating thereto, and also to enforce such rights as he may have in the premises.

51. To the end, therefore, that the defendants may, if they can show why complainant should not have the relief hereby prayed, and may, upon their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say:

1. Whether the said Thomas H.. Williams, died at the time and place mentioned, or if not, at what time and place did he die?

2. Whether Sherrod Williams, Percy Williams, Bryant Williams and Mary B. Goodrich died in the order above named or in what order did they die?

3. Did Sherrod Williams, Percy Williams, Bryant Williams and Mary B. Goodrich respectively die at or about the times above stated, or at what time did they respectively die?

4. Whether upon their respective deaths they severally left the heirs at law as above stated, or what other or different heirs at law did they respectively have at their respective deaths?

5. Whether said Thomas H. Williams left no wife, as above stated.

6. Whether the only heirs at law of said Thomas H. Williams, at his death, were Sherrod Williams, Thomas H. Williams, Jr., Mary B. Goodrich, Percy Williams and Bryant Williams, as above stated, or what other and different heirs at law did he leave at his death?

7. Whether at the time of the death of said Thomas H. Williams, the mother of said children and heirs at law was dead?

8. Whether said Percy Williams married and had issue, as above stated, or to whom and when and where was he married and what issue was born of said marriage?

9. Whether the issue of said Percy's marriage, died above stated, or when and where did such issue die.

10. Whether said Sherrod Williams left no wife or lawful issue as above stated.

11. Whether said Bryant Williams died unmarried and without lawful issue, as above stated.

12. Whether said Mary B. Williams was married to said Frank S. Johnson as above stated and when and where was she married to him, and whether she had as issue of said marriage, defendant Frank Hansford Johnson, as above stated.

13. Whether said issue is of the age above stated or of what age is he.

14. Whether the said George E. Williams, after taking possession of said estate, administered it in accordance with the provisions of said will and codicil, and did continue the business of the said Thomas H. Williams as a above stated, or in what other or different way did he manage the said property.

15. For how long did he continue to administer the property of the estate of said Thomas H. Williams, deceased, under the provisions of said Will, or how otherwise did he manage or administer said estate and for how long.

16. Whether said Thomas H. Williams, Jr., pretended that George G. Goodrich, the complainant, was given a day in court in said probate proceedings in the said Superior Court of the City and County of San Francisco, Probate Division, in the proceeding entitled "In the Matter of the Estate of Thomas H. Williams, deceased," to show cause against the said decree of distribution, or any other proceedings therein, and state particularly in what manner and how it is pretended or claimed by said Thomas H. Williams, Jr., that the complainant was given a day in court in said proceedings in said matter, to show cause against the said decree, or

against any, and which, of the said proceedings in said matter.

17. Whether said Frank Hansford Johnson, through his said guardian Frank S. Johnson, pretended that George G. Goodrich, the complainant, was given a day in court in said probate proceedings, in the said Superior Court of the City and County of San Francisco, Probate Division, in the proceedings entitled "In the Matter of the Estate of Thomas H. Williams, deceased", to show cause against the said decree of distribution or any other proceedings therein, and state particularly in what manner, or how, it is pretended or claimed by said Frank Hansford Johnson, through his said guardian Frank S. Johnson, that the complainant was given a day in court in said proceedings, in said matter, to show cause against the said decree, or against any, and which, of the said proceedings in said matter.

18. Whether the said Thomas H. Williams, Jr., refuses to account to the complainant, as his trustee, for the share of the property described in said decree of distribution and for the rents and profits thereof, in his hands, to which complainant is entitled as above stated.

19. Whether the said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, refuses to account to the complainant, as his trustee for the share of the property described in said decree of distribution and for the rents and profits thereof, in his hands, to which complainant is entitled, as above stated.

20. Whether the said John W. Ferris, upon his appointment and qualification as trustee, as the successor of George E. Williams, as above stated, took possession of the property described in said decree of distribution and set apart thereby to George E. Williams, as such trustee, and whether he still has such possession thereof, and what,

if any disposition has he made of the same, or any, and which part thereof, and what, if any, incumbrance has he placed, or permitted to be placed, thereon, or any and what part thereof, and what, if any, rents and profits thereof have come into his hands, since the said property came into his possession, and whether any part thereof has been sold or exchanged for other property, and if any part thereof has been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of, and how was any property purchased with such proceeds disposed of, and by what authority said alienations or incumbrances, or re-investments, and each of them, were done, made or suffered.

21. Whether the said Thomas H. Williams, Jr., took possession of the property described in said decree of distribution as set apart to him in fee, and whether he still has possession of the same, and what, if any, incumbrances has he placed, or permitted to be placed, thereon, or on any, and which part thereof, and the extent and nature of such incumbrance or incumbrances, and what, if any, rents and profits thereof have come into his hands since the same came into his possession, and whether any part of said property has been sold or exchanged for other property, and, if any part thereof has been sold, in what manner were the proceeds and the rents, issues and profits of said proceeds disposed of, and how, if at all, was any property purchased with such proceeds, disposed of, and by what authority said alienations or incumbrances, or re-investments, and each of them were done, made or suffered.

22. Whether the said Frank Hansford Johnson, through his said guardianFrank S. Johnson, took possession of the property described in any decree of distribution as set apart to him, in fee, and whether he still has such possession, and what, if any, disposition has he made of the same or any and which part thereof, and what, if any,

incumbrances has he placed or permitted to be placed thereon, or on any, and which, part thereof, and the extent and nature of such incumbrance, and what, if any, rents and profits thereof have come into his hands since the same came into his possession and whether any part thereof has been sold or exchanged for other property, and if any part thereof has been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of, and how, if at all, was any property purchased with such proceeds disposed of, and by what authority said alienation or incumbrances or re-investment and each of them, were done, made or suffered.

52. And that said decree of distribution may for the reasons aforesaid be decreed by this Honorable Court to be fraudulent and of no force and effect as against the complainant.

And that this Honorable Court will decree that the trust attempted to be created by said will of said Thomas H. Williams, deceased, was void at its creation, and that as to said real estate embraced in said void trust the said Thomas H. Williams died intestate, and that at his death the said real estate passed to, and vested in, his said heirs at law; and that complainant, on the death of his said wife; became entitled to seven thirty-seconds of said real estate, then in the hands of George E. Williams, executor and trustee under the Will of Thomas H. Williams, deceased.

And that the defendants, Thomas H. Williams, Jr., Frank Hansford Johnson, Frank S. Johnson and John W. Ferris will severally make discovery of the property to which the complainant is entitled and which has come into their hands under said decree of distribution, and of the proceeds of the sale of any thereof, and of the rents issues and profits thereof by them severally or jointly received.

And that this Honorable Court will decree that said defendants Thomas H. Williams, Jr., Frank

Hansford Johnson and John W. Ferris, are trustees for complainant of that part of the real estate of said Thomas H. Williams, deceased, to which he is entitled as heir at law of his deceased wife, said Mary Bryant Goodrich, and which came into their possession, as aforesaid, under said decree of distribution and the rents and profits thereof received by them, said Thomas H. Williams, Jr., Frank Hansford Johnson and John W. Ferris, and that said real estate, and the proceeds thereof, if sold by them, is charged in their hands with a trust in favor of complainant to that extent.

And that a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of the said property, to take and hold the same and to collect the rents and profits thereof during the pendency of this suit, and upon the final decree herein to make such disposition of such property as in and by said decree directed, and to obey each and every other order or decree herein.

And that an accounting be had under the direction of this Honorable Court of the real estate which came into the hands of defendants Thomas H. Williams, Jr., Frank Hansford Johnson and George E. Williams, Trustee, and his successor, the defendant John W. Ferris, under said decree of distribution, and the rents and profits thereof.

That upon said accounting it be ascertained to what portion of said real estate and of the rents and profits thereof complainant is entitled from said defendants, and each of them; that as to the portion to which complainant is entitled, they and each of them may, by decree and order of this Honorable Court, be ordered severally to convey and transfer to complainant such part so found due from each of them, or the value thereof, to be ascertained by this Honorable Court, and that they, and each of them, be enjoined and re-

strained, during the pendency of this action and perpetually thereafter, from conveying, alienating or incumbering the said real estate, or its proceeds if sold, until the share and proportion of said real estate, and the rents and profits thereof to which complainant is entitled, and which the court shall find said John W. Ferris, Frank Hansford Johnson and Thomas H. Williams, Jr., either severally or collectively, wrongfully in possession of, or the value thereof, be conveyed and transferred to complainant, and until the said defendants John W. Ferris, Thomas H. Williams, Jr., and Frank Hansford Johnson, and each of them, shall be discharged and released from the trust in complainant's favor which has become a charge against said real estate of its proceeds in their and each of their hands, to the extent of the interest of complainant therein, and complainant prays for such other and further relief as the nature of this case may require and to your Honors may seem meet.

To said bill of complaint the several respondents-appellees here have all appeared by their respective solicitors and filed demurrers, which said demurrers are fully set out in the Transscript of Record as follows:

Demurrer John W. Ferris, Thomas H. Williams, Jr., Thomas H. Williams, 2nd, Georgie E. Williams, and Jennie E. Williams, by Henry Ach, their Solicitor at pp. 56, 57 and 58.

Demurrer of Frank S. Johnson, by his Solicitors at pp. 59, 60 and 61.

Demurrer of Frank Hansford Johnson, by his Solicitors, at pp. 62 and 63.

On the 21st day of May, 1906 (Transcript, p. 70), the court sustained said demurrers, and each of them, and entered an order to that effect.

The opinion of the lower court may be found in the Transcript of Record at pp. 73-90.

And thereafter, on October 11th, 1906, said court made and entered a final decree dismissing the bill (Transcript, p. 72).

On April 10th, 1907, appellant filed his petition for appeal to the Supreme Court of the United States, from said decree, together with his assignment of errors (Transcript, pp. 90, 91, 92, 93, and 94).

Said appeal was allowed April 11th, 1907, upon the giving of bond in the sum of $500.00, which bond was filed and approved April 11th, 1907 (Transcript, pp. 91-94).

Citation upon appellees issued and admitted April 12th, 1907 (Transcript, p. 96).

The Assignments of Errors, omitting formal parts, is as follows:

The Assignment of Errors on Appeal from the Circuit Court to the Supreme Court of the United States.

"The complainant prays on appeal from the final decree of this court to the Supreme Court of the United States, the said final decree of this court having been made and entered on the 11th day of October, 1906, in favor of respondents, and complainant assigns for error:

I.

That sections 1633 and 1634 of the code of Civil Procedure of the State of California, are in contravention of the Constitution of the United States, and especially Section 1, of article XIV thereof; no day in court is allowed a party interested in any matter in which the proceedings are taken against him under the provisions of said sections, and no sufficient, proper or legal notice to such party is prescribed of any proceedings against him in any such matter by either of said sections; and the same do not provide for any such notice, and do not constitute due pro-

cess of law within the meaning of Section 1 of Article XIV of the Constitution of the United States, and that the notice or notices provided for by said sections do not constitute due process of law within the meaning of said Section 1 of Article XIV of the Constitution of the United States.

II.

That the notice of the hearing of the final account and the petition for distribution in the matter of the estate of Thomas H. Williams, deceased, referred to in the bill of complaint, and in the opinion of the Circuit Court, were not and did not constitute due process of law within the meaning of Section 1 of Article XIV of the Constitution of the United States, and the complainant never had his day in court in said proceedings for distribution and that the settlement and distribution of said estate were and are void, and that by reason of the proceedings had and taken by the defendants Thomas H. Williams, Jr., Frank Hansford Johnson and Frank S. Johnson, guardian as aforesaid, in the matter of the settlement and distribution of the said estate, complainant has been deprived of his interest in the property of said Thomas H. Williams, deceased, without due process of law, within the meaning of Section 1 of Article XIV of the Constitution of the United States.

III.

That defendants Frank Hansford Johnson, Frank S. Johnson, guardian of his estate, and Thomas H. Williams, Jr., became trustees for the complainant under the general principles of equity jurisprudence, and also under Sections 2223 and 2224 of the Civil Code of the State of California, and the Circuit Court erred in holding otherwise;

IV.

That the trust attempted to be created by the will of Thomas H. Williams, deceased, mentioned in the bill of complaint and in the opinion of the Circuit Court, was and is in contravention of sections 715, 716, 749 and 771 of the Civil Code of the State of California, and was and is void and the Circuit Court erred in holding otherwise;

V.

That the Superior Court of the State of California, in and for the City and County of San Francisco, which decreed a settlement of the final account of the executor of the will of said Thomas H. Williams, deceased, and a final distribution of his estate, never acquired or possessed jurisdiction so to do, and the proceedings whereby it was sought to settle said account and distribute said estate were and are void, by reason of the fraud and concealment practiced upon complainant by the defendant Frank Hansford Johnson, through his guardian, defendant Frank S. Johnson, and by defendant Thomas H. Williams, Jr., and also, because the complainant was not made a party to the proceedings aforesaid, and had no notice thereof; and the Circuit Court erred in holding that such proceedings were valid;

VI.

That the proceedings in the matter of the estate of said Thomas H. Williams, deceased, in said Superior Court of California, were never revived as against the complainant, after the death of his wife (who was a daughter of said Thomas H. Wliliams, deceased, and one of his heirs at law), as provided in Sections 385 and 1713 of the Code of Civil Procedure of the State of California, and accordingly the same were and are void; and the Circuit Court erred in holding otherwise;

VII.

That the Circuit Court erred in holding that the notice attempted to be given the complainant of the hearing of the final account of the executor of the will of said Thomas H. Williams, deceased, and his petition for distribution of said estate, which notice was given by posting only, was sufficient;

VIII.

That the Circuit Court erred in holding that the bill of complaint showed no extraneous or collateral fraud sufficient to avoid the decree settling the final account of the executor of the will of said Thomas H. Williams, deceased, and distributing his estate;

IX.

That the Circuit Court erred in refusing complainant leave to amend his bill of complaint;

X.

That the Circuit Court erred in sustaining the demurrer to the bill of complaint of defendants John W. Ferris, Thomas H. Williams, Jr., Georgie E. Williams, Jennie E. Williams and Thomas H. Williams 2nd;

XI.

That the Circuit Court erred in sustaining the demurrer to the bill of complaint of the defendant Frank Hansford Johnson, an infant, by Frank S. Johnson, his general guardian;

XII.

That the Circuit Court erred in sustaining the demurrer to the bill of complaint of the defendant Frank S. Johnson.

XIII.

That the Circuit Court erred in dismissing the complainant's bill of complaint.

XIV.

That the Circuit Court erred in holding, as in the opinion of the judge it is held, and was declared by the decree, that Sections 1633 and 1634 of the Code of Civil Procedure of the State of California are constitutional; that the notice therein prescribed is sufficient, and that complainant was a party to the probate proceedings aforesaid, and is bound by the decree of said Superior Court.

Wherefore complainant prays that said decree of the Circuit Court be reversed."

SECTIONS OF CALIFORNIA CODE.

The Sections of the Civil Code of California involved in this proceeding, and cited in the Assignment of Errors, are as follows:

"SECTION 1633. When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of the settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper."

"SECTION 1634. WHEN SETTLEMENT IS FINAL, NOTICE MUST SO STATE. It the settlement mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice

must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings."

"SECTION 2223. INVOLUNTARY TRUSTEE, WHO IS. One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner."

"SECTION 2224. INVOLUNTARY TRUST RESULTING FROM FRAUD, MISTAKE, ETC. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

"SECTION 715. The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in Section 772."

"SECTION 716. Every future interest is void in its creation which, *by any possibility*, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

"SECTION 749. The delivery of the grant, where a limitation condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the Code."

"SECTION 771. The suspension of all power to alienate the subject of a trust, other than a power

to exchange it for other property to be held upon the same trust, or to sell it, and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Section 715."

SECTION 385—ACTION WHEN TO ABATE BY DEATH, MARRIAGE OR OTHER DISABILITY—PROCEEDINGS IN SUCH CASE.

An action or proceeding does not abate by the death of any disability of a party, or by the transfer of any interest therein if the cause of action survive or continue. In case of the death or any disability of a party, the Court on motion may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

"SECTION 1713. RULES OF PRACTICE GENERALLY, EXCEPT AS OTHERWISE PROVIDED IN THIS TITLE. The provisions of Part 2 of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title."

SECTION 1572: ACTUAL FRAUD, WHAT.

Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract.

1. The suggestion as a fact, of that which is not true, by one who does not believe it to be true;

2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

SECTION 723. ACCUMULATIONS WHEN VOID. All directions for the accumulation of the income of property, except such as are allowed by this title, are void.

SECTION 724. ACCUMULATION OF INCOME. An accumulation of the income of property for the benefit of one or more persons may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows:

(1) If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority, or

(2) If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future estates, and during the minority of the beneficiaries and terminate at the expiration of such minority.

SECTION 857. FOR WHAT PURPOSE EXPRESS TRUSTS MAY BE CREATED. EXPRESS TRUSTS MAY BE CREATED FOR THE FOLLOWING PURPOSES:

(1) To sell property and apply or dispose of the proceeds in accordance with the instrument creating the trust.

(2) To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.

(3) To receive the rents and profits of real property and apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person or for any shorter time, subject to the rules of title 11 of this part, or

(4) To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits of the same title.

Points and Authorities.

I.

The Probate Division of the Superior Court of the City and County of San Francisco was without jurisdiction to make the decree of distribution now relied on to deprive appellant of his interest in the estate, for the following reasons:

1. Appellant was not a party to said proceedings, or to the petitions filed therein, or to the orders made therein, or to said decree of distribu-

tion. It therefore requires no citation of authority for the proposition that the decree could only have validity, if at all, as a decree *in rem*.

Pennoyer v. *Neff*, 95 U. S., 714.
Roller v. *Holly*, 176 U. S., 398.
Campbell-Kawannakoa v. *Campbell*, 152 Cal., 201; 92 Pac., 184.

2. Said decree of distribution is a mere consent decree, entered by the Court, not as an adjudication of contested questions of law and fact, but pursuant to an agreement, purporting to have been made by all parties in interest, withdrawing all such questions from the Court and determining those questions out of Court. Appellant was not party to the agreement, or to the consent or to the decree. Neither the agreement nor the decree carrying out the agreement can, therefore, affect his rights.

And where the Court is asked to give effect to such a decree as *res adjudicata* or estoppel it will inquire into the authority to give the consent, as well as into the decree itself to determine whether or not it is for the right party.

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S., 552.
Oakland v. *O. W. F. Co.*, 118 Cal., 227;
Gay v. *Parpart*, 106 U. S., 679;
Wadhams v. *Gay*, 73 Ill., 415;
Brownsville v. *Loague*, 129 U. S., 493;
Texas and Pacific Ry. Co. v. *So. Pac. Co.*, 137 U. S., 48-56.

Section 771: Suspension by Trust.

The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust,

or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Section 715.

Marsee v. *Land Co.* (Ky.), 65 S. W., 118;
Kain v. *Gibboney*, 101 U. S. 362, 369;
Campbell-Kawannakoa v. *Campbell*, 152 Cal., 201.

3. The notice of final settlement and distribution posted for ten days in the City and County of San Francisco, did not constitute due process of law as to appellant, who was and is a citizen and resident of the State of New York.

Hovey v. *Elliot*, 167 U. S., 409, 447;
Chicago, etc., R. R. v. *Chicago*, 166 U. S., 232;
Galpin v. *Page*, 18 Wall., 350;
Smyth v. *Ames*, 169 U. S., 466;
Roller v. *Holly*, 176 U. S., 398;
Davidson v. *New Orleans*, 96 U. S., 97;
Hagar v. *Rec. Dist.*, 111 U. S., 712.

In *Roller* v. *Holly*, *supra*, personal service of a defendant residing in Virginia was made of a process issued in Texas. The notice therein given was five days, and the Court, in its opinion, had this to say:

"From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the day of service and return, and that there is no distinction in this particular between defendants living in the town where the court is sitting and defendants living in other states, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them.

* * * * *

"That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson* v. *New Orleans*, 96 U. S., 97, 24 L. Ed. 616; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S., 701-712, 28 L. ed. 569-573, 4 Sup. Ct. Rep., 663."

The notice, even if it had been served upon him personally, would not have given him an opportunity to make a proper appearance in Court, and due process of law has been repeatedly interpreted by this Court to mean not only that a party shall have notice, *but that he shall have a reasonable and fair opportunity of being heard.*

> *Hagar* v. *Reclamation District Union* 108, 111 U. S., 722.

4. Sections 1633 and 1634 of the Civil Code of California, upon which jurisdiction of the court to make the consent decree of distribution is based, are in contravention of Section 1, Article XIV of the Constitution of the United States.

> *Costello* v. *McGonico*, 168 U. S., 674;
> *Tyler* v. *Judges*, etc., 179 U. S., 405;
> *Wennard* v. *Louisiana*, 72 U. S., 480;
> *Cooley, Constitutional Limitations*, 353;
> *Hamilton* v. *Brown*, 161 U. S., 256;
> *Louisville & W. R. Co.* v. *Schmidt*, 177 U. S., 230;
> *Simon* v. *Croft*, 182 U. S., 427;
> *Iowa C. R. Co.* v. *Iowa*, 160 U. S., 389;
> *Bardwell* v. *Collins*, 44 Minn. 97 (20 Am. St. Rep. 541-556);

Violet v. *Alexandria*, 92 Va., 561 (31 L. R. A.);
Levy v. *San Francisco Superior Court*, 167 U. S., 175;
Clarke v. *McDade*, 165 U. S., 168; 134 U. S., 316;
Hurbado v. *California*, 110 U. S., 516.

II.

The fraud and collusion charged in the bill of complaint, in the settlement of final account and obtaining the decree of distribution, are sufficient to avoid such decree as to appellant (complainant below).

The bill charges and the demurrers admit:

1. That appellant, at the time of the filing of the petitions in the Probate Court of San Francisco, and the proceedings under them, was an heir at law of his wife, Mary Bryant Goodrich, deceased, and entitled to one half of her estate;

2. That appellant was at all times, and is a citizen and resident of the State of New York;

3. That appellant was never in the State of California at any time since the death of his wife, except when he took her remains to San Francisco for interment;

4. That, on the occasion in question, on account of the fact that appellant's said wife had, prior to her death, been sued by a firm of jewelers in New York for several thousand dollars, appellant

inquired of George E. Williams whether or not she left any property or estate, and was assured by said George E. Williams that she had no property or estate in California of any kind or character whatsoever;

5. That George E. Williams was the brother of Thomas H. Williams, deceased, executor and trustee under his will; that he was the attorney at law of many years practice and great experience; that he had been judge of the Superior Court of San Francisco;

6. That appellant knew nothing of the laws of California; knew nothing about the will of Thomas H. Williams, deceased; knew nothing about his wife's interest under said will or in his estate, and relied absolutely upon the statement made by said George E. Williams, which he believed to be true, and forbore further inquiry on that account.

7. That George E. Williams, Thomas H. Williams, Jr., and Frank Hansford Johnson, and Frank S. Johnson, his guardian, at all times knew of appellant's marriage to Mary Bryant Goodrich (born Williams); that they at all times knew his rights as her heir at law; that they at all times knew appellant's residence and address.

8. That, with this knowledge, and in furtherance of a fraudulent conspiracy between the said George E. Williams, Thomas H. Williams, Jr., and Frank Hansford Johnson, through his guardian Frank S. Johnson, the object of which was to obtain the decree of distribution in their favor, and to wrongfully and fraudulently deprive appellant of his interest in said property, the said conspirators committed the following acts and made the following representations:

(a) On August 1st, 1896, Frank Hansford Johnson, by his guardian, Frank S. Johnson, by petition, applied to the Superior Court of Marin County, California, for leave to consent to a decree of distribution of the estate of Thomas H. Williams, deceased, and to the appointment of appraisers. In said petition the said Johnson fraudulently and falsely represented that Frank S. Johnson was the husband of Mary Bryant (Williams), at the time of her death, and that her only heir at law was Frank Hansford Johnson; and concealed the fact of appellant's marriage with her after her divorce and represented that Frank Hansford Johnson and Thomas H. Williams, Jr., were the sole parties in interest. And on these representations obtained the permission to consent.

(b) On August 7th, 1896, Thomas H. Williams, Jr., filed a petition in the Probate Division of the Superior Court of the City and County of San Francisco, asking for appraisers in which the same representations were made and concealment practiced. Also that a settlement and distribution had been agreed on between Thomas H. Williams, Jr. and Frank Hansford Johnson, thereby avoiding *"the determination of many difficult, intricate and unsettled matters of testamentary construction and of fact,"* all of which had been settled out of court by said Williams and Johnson, who were the only persons interested.

Notice of the hearing of said petition was directed by the court to be served on George E. Williams, Frank S. Johnson and Frank Hansford Johnson, and to no one else.

That on August 12th, 1896, George E. Williams, Thomas H. Williams, Jr., Frank Hansford Johnson and Frank S. Johnson, his guardian, all ap-

peared in court and consented to the appointment of appraisers. The appraisers filed their appraisement December 11th, 1896.

(c) On December 15th, 1896, Thomas H. Williams, Jr., filed his petition for final distribution as beneficiary, in which said false representations and concealment were again made and practiced.

(d) On the same day, December 15th, 1896, George E. Williams, also filed his final account and petition for distribution, in which the same false statements were made, the same concealment practiced, and the same agreement between Williams and Johnson, as the only person in interest, set forth.

(e) Under these proceedings, and induced by these fraudulent and false representations, the decree of distribution was made January 5th, 1897.

9. That the appellant has no notice or knowledge of any of said proceedings until November, 1903, and took no part therein.

THESE FRAUDS ARE SUFFICIENT TO GIVE JURISDICTION TO A COURT OF EQUITY OF THE UNITED STATES, AND TO AUTHORIZE THE SETTING ASIDE OF THE DECREE OF DISTRIBUTION AND TO HOLD THE RESPONDENTS AS TRUSTEES FOR APPELLANT.

Arrowsmith *v.* Gleason, 129 U. S., 86;
Johnson *v.* Waters, 111 U. S., 640;
Marshall *v.* Holmes, 141 U. S., 589;
McDaniel *v.* Traylor, 196 U. S., 422, 423;
Cowley *v.* Northern Pacific R. Co., 159 U. S., 569, 583;
Barrow *v.* Hunton, 99 U. S., 80;

Green *v.* Creighton, 23 How., 90;
Gaines *v.* Fuentes, 92 U. S., 10;
Bacon *v.* Bacon, 150 Cal., 477;
Curtis *v.* Schell, 129 Cal., 208;
Campbell-Kawannakoa *v.* Campbell 152 Cal., 201;
Marine Ins. Co. *v.* Hodgson, 7 Cranch., 332, 336;
Ball *v.* Tompkins, *et al.*, 41 Fed., 486;
Daniels *v.* Benedict, *et al.*, 50 Fed., 347, 354;
Yeatman *v.* Bradford, 44 Fed., 537;
Dringer *v.* Railway, 42 N. J. Eq., 573;
Payne *v.* Hook, 7 Wall., 425, 430.
Kerr Fraud and Mistake, 352, 353;
2 Story Eq. Jur., §§1570, 1573;
Harley *v.* Harley, 114 Cal., 693;
Sohler *v.* Sohler, 135 Cal., 323;
Bergin *v.* Haight, 99 Cal., 52;
Dunlap *v.* Stone, 92 Cal., 346;
McKershan *v.* Comerford, 96 Cal., 439;
Silva *v.* Santos, 138 Cal., 536;
Aldrich *v.* Barton, 138 Cal., 220;
Sullivan *v.* Lumsden, 118 Cal., 664;
Anderson *v.* Bank of Lassen County, 140 Cal., 695; 74 Pac., 287;
People *v.* Perris Inr. Dist., 142 Cal., 601;
Tilman *v.* Thomas, 87 Ala., 321; 6 So., 151; 13 Am. St. Rep., 42;
Fisher *v.* Wood, 65 Tex., 199;
Lawson *v.* Acton, 57 N. J. Eq., 107; 40 Atl., 584;
Hoffman v. Wheelock, 62 Wis., 436; 22 N. W., 713, 716;
Reigal *v.* Wood, 1 Johns. Ch., 402;
Bowen *v.* Evans, 2 H. L. Cas., 257, 281.

The language in the opinion of the Court, in

the following cases, is so peculiarly apt, that they are particularly referred to:

In *Arrowsmith* v. *Gleason, supra,* the Court said:

"These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing, not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what, according to the principles of equity, they ought to do; thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

The decree was reversed.

In *Curtis* v. *Schell, supra,* the Supreme Court of California, in rendering its opinion, used the following language:

"The complaint in the case charged a willful suppression of material facts, and the suggestion of a falsehood by the defendant, with the intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and averred that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors. This court held that that constituted fraud. * * * It will hardly be contended that a remedy for the wrongs complained of, thus restricted, is not defective and inadequate, as compared with an original equitable action,

adapted to a thorough investigation of the issues, and in which all errors committed by the Trial Court may be corrected on appeal." *Johnson* v. *Waters,* 111 U. S., 640. * * *

"It appears, therefore, from the foregoing cases,—and many others to the same effect might be cited,—that it was not necessary to first revise or set aside the orders made by the probate court. The desired purpose can be accomplished by allowing the sale ordered by that court to proceed, but to direct and control the disposition of the proceeds of such sale according to the right of the case, and this was done by the court below in its decree. * * *

"The equitable relief thus sought could not be granted in the probate department of the court, for the reason that such relief is not within its probate jurisdiction. * * *

"For this want of jurisdiction in the proceeding for the administration of the estate, the equity jurisdiction of the court was properly invoked and exercised herein. The judgment, and the order denying the motion to vacate and set aside the said judgment, are affirmed."

And the Supreme Court of California, in *Campbell-Kawannanakoa* v. *Campbell, supra,* which is the most recent case decided, bearing on this question, in referring to the subject matter of this point, at page 187, stated:

"Where the judgment or order assailed is of such a character that a court of equity may not properly set it aside, it may nevertheless prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party. This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of

the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists. The contention that a proceeding of the kind before us constitutes a collateral attack on the probate orders is not well founded. It is a direct attack. *Bacon* v. *Bacon, supra; Bergin* v. *Haight,* 99 Cal., 52, 33 Pac., 760. In view of what has been said, it is apparent that, even if it be assumed that the order distributing the purported proceeds was an adjudication by the Superior Court of the validity of the trust which is not collaterally assailable (*Crew* v. *Pratt,* 119 Cal., 139, 51 Pac., 38; *Matter of Trust of Trescony,* 119 Cal., 568, 51 Pac., 951), such adjudication will not bar this proceeding if it was obtained by fraud of such a character as will warrant the exercise of the well-settled equitable jurisdiction.

"It is true, as urged by counsel for respondents, that a court of equity is not authorized to relieve a party from the effect of a judgment or order of a court having jurisdiction to render the judgment or make the order on the ground that the same was obtained by fraud, unless the fraud be, as was said in *Pico* v. *Cohn,* 91 Cal., 129, 25 Pac., 970, 27 Pac., 537, 13 L. R. A., 336, 25 Am. St. Rep., 159, 'extrinsic or collateral to the questions examined and determined' in the proceeding resulting in the judgment or order. * * *

"Such an imposition upon the jurisdiction of the court, to the injury of the absent property owners, from whom the nature of the transaction was concealed and who were wholly in ignorance thereof, and could not have learned concerning the same from anything appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate and the preservation of the property for legal distribution (*Bergin* v. *Haight, supra*), and who was, moreover, as the natural guardian of two of the owners, under obligation to protect

their rights (*Sohler* v. *Sohler, supra*), clearly constituted under the authorities what is known as extrinsic fraud, warranting equitable relief. See *Bergin* v. *Haight, supra; Tillman* v. *Thomas,* 87 Ala., 321, 6 South., 151, 13 Am. St. Rep., 42; *Fisher* v. *Wood,* 65 Tex., 199; *McCampbell* v. *Durst,* 73 Tex., 410, 11 S. W., 380; *Lawson* v. *Acton,* 57 N. J. Eq., 107, 40 Atl., 584; *Hoffman* v. *Wheelock,* 62 Wis., 436, 22 N. W., 713, 716; *Arrowsmith* v. *Gleason,* 129 U. S., 86, 9 Sup. Ct., 237, 32 L. Ed., 630; *Wickersham* v. *Comerford,* 96 Cal., 433; *Curtis* v. *Schell,* 129 Cal., 208, 61 Pac., 951, 79 Am. St. Rep., 107; *Anderson* v. *Bank of Lassen Co.,* 140 Cal., 695, 74 Pac., 287. See also, *Sohler* v. *Sohler, supra; Aldrich* v. *Barton, supra.*"

III.

The appellant is not barred by the Statute of Limitations, or laches.

1. Where the fraud is secret and the suit is commenced within a reasonable time after evidence of the fraud is discovered, such defenses cannot prevail.

Meador *et al. v.* Norton, 11 Wall, 442, 458;
Bailey, Assignee, *v.* Glover *et al.,* 21 Wall, 343, 349;
Fraer *et al. v.* Clews, 115 U. S., 528;
McIntyre *v.* Pryor, 173 U. S., 38;
Saxlehuer *v.* Eisner & Mendelson Co., 179 U. S., 19, 39;
Bacon *v.* Bacon *et al.,* 150 Cal., 477;
Kirby *v.* Lake Shore, etc., Railroad, 120 U. S., 130, 136;
Duff, Assignee, etc., *v.* Bank, 13 Fed., 65;
Greewald *et al. v.* Appell, 17 Fed., 140;

Bartles *v.* Gibson, 17 Fed., 293;
Cook *et al.*, Exrs., *v.* Sherman, Assignee, *et al.*, 20 Fed., 167;
Hodge *et al. v.* Palms *et al.*, 68 Fed., 61;
Laut *v.* Manley *et al.* (Court of App., 6th Cir.), 75 Fed., 627;
Alger *v.* Keith *et al.* (Court of App., 6th Cir.), 105 Fed., 105;
Preston *v.* Cutter, 64 N. H., 468; 13 Atl., 879;
Todd *v.* Rafferty, 30 N. J. Eq., 258;
Weeks *v.* Milwaukee, etc., Ry. Co., 78 Wis., 515; 47 N. W. ,741;
Pomeroy's Eq. Jur. (2nd ed.), Vol. 2, Sec. 918;
Rolfe *v.* Gregory, 4 De Gex. J. & S., 576;
Brake *et al. v.* Payne, 137 Ind., 479, 483;
Ellison's Estate, 163 Pa., 315;
Ex-Mission L. & W. Co. *v.* Flesh, 97 Cal., 632;
Horey *v.* Bradbury, 112 Cal., 620;
Holt *v.* Wilson, 75 Ala., 58;
Lewis *v.* Welch, 47 Minn., 193;
Kilburn *v.* Sunderland, 130 U. S., 505;
Middaugh *v.* Fox, 135 Ill., 344;
Sayre *v.* Elyton Land Co., 73 Ala., 101;
Prevost *v.* Gratz, 6 Wheat., 481;
Michoud *v.* Girod, 4 How., 503;
18 Am. & Eng. Ency. Law, 115;
Penn *v.* Folger, 182 Ill., 78, 109.

2. The property of this estate is still in the hands of the wrongdoers and there are no intervening equities. Laches does not consist in mere delay, but in delay that works disadvantage to another.

18 Am. & Eng. Ency. of Law, 104;
Wheeling B. & T. Co. *v.* Reymann B. Co., 90 Fed., 195;

Bank *v.* Hiatt, 58 Cal., 237;
Senter *v.* Senter, 70 Cal., 621, 622;
Bechtold *v.* Read (N. J.), 22 Atl., 1085;
Lataillah *v.* Orena, 91 Cal., 565;
Tyman *v.* Warren, 31 Atl., 596;
14 Am. & English Ency. Law, pp. 120, 121, 123;
Brissell *v.* Knapp 155 Fed., 809;
Krohn *v.* Williamson *et al.*, 62 Fed., 869.

3. Appellant was lulled into security by the statement of George E. Williams to him and forbore further inquiry or investigation; the fact of such reliance is demonstrated by the fact that he took no steps to protect his rights. On these statements he had a right to rely.

Roseman *v.* Conovan, 43 Cal., 117;
Bank of Woodland *v.* Hiatt, 58 Cal., 237;
Senter *v.* Senter, 70 Cal., 621;
Dorr *v.* Swain, 125 Cal., 681;
14 Am. & Eng. Ency. Law, 57, 74, 75, 95, 104;
Champion *v.* Woods, 79 Cal., 17;
McFerran *v.* Taylor, 3 Cranch (U. S.), 281;
Smith *v.* Richards, 13 Pet. (U. S.), 38;
2 Pomeroy's Eq. Jur., sec. 878, 888, 891, 892, 902;
1 Bigelow on Fraud, p. 388.

4. These statements of Williams were not mere expressions of opinion.

California Civil Code, §1572;
14 Am. & Eng. Ency. Law, 34, 35, 58;
Lehman *v.* Shackelford, 50 Ala., 437;
Campbell *v.* Hillman, 61 Am. Dec., 195;
19 Am. & Eng. Ency. Law, 255, Note 7;

Wheeler *v.* Smith, 9 How., 55;
Tompkins *v.* Hollister, 60 Mich., 470;
Hickman *v.* Hickman, 46 Mo. App., 496.

5. George E. Williams stood in a fiduciary relation to the appellant, as well as to appellees. The appellees conspired with said Williams to so deal with the trust estate as to keep the appellant in ignorance of his rights, thereby causing the delay by which they now seek to profit.

Campbell-Kawannanakoa, et al., v. *Campbell, et al.*, 152 Cal., 204; 92 Pac., 184;
Colton v. *Stanford*, 82 Cal., 356;
Davoue v. *Fanning*, 2 Johns. Ch., 252;
Michoud v. *Girod*, 4 How. (U. S.), 566;
14 Am. & Eng. Ency. Law (2nd Ed.), 72;
Bennett v. *McMillan*, 57 Am. St. Rep., 591;
Virginia L. Co. v. *Haupt*, 44 Am. St. Rep., 939;
Civil Code of California, Sec. 2219;
Robbins v. *Hope*, 57 Cal., 497;
Smith v. *Ogilvie*, 127 N. Y., 148;
1 Bigelow on Frauds, pp. 262, 365;
2 Pomeroy's Ed. Jur., Sec. 956;
Bergin v. *Haight*, 99 Cal., 52; 33 Pac., 760;
Arrowsmith v. *Gleason*, 129 U. S., 86.

IV.

The trust created by the will is void under the Laws of California and, at the death of the testator, the remainder of the estate, after paying Percy his $50,000, descended to the heirs at law.

(1) It was contrary to the laws of the State, prohibiting the suspension of the power of alienation.

Civil Code, Sections 715, 716, 771;
In re Walkerly, 108 Cal., 627;
Campbell-Kawannakoa v. *Campbell, et al.,* 152 Cal., 204; 92 Pac., 184;
Benelack v. *Richards,* 116 Cal., 405;
Estate of Delaney, 49 Cal., 76;
Estate of Steele, 124 Cal., 434.

And this Court has found likewise:

Horner v. *United States,* 143 U. S., 570;
Baker v. *Varney,* 129 Cal., 564.

(2) It devised the title to real property absolutely to the testamentary trustees to be conveyed by them to the beneficiaries.

Williams Estate, 92 Cal., 883;
Estate of Fair, 132 Cal., 523; 60 Pac., 442; 64 Pac., 100; 84 Am. St. Rep., 70;
Estate of Sanford, 136 Cal., 97; 68 Pac., 494;
Estate of Pichoir, 139 Cal., 682; 73 Pac., 606;
Campbell-Kawannanakoa v. *Campbell,* 152 Cal., 204; 92 Pac., 184.

The Court has particularly referred to the case

of *Arrowsmith* v. *Gleason, supra,* which has already been cited and quoted in this brief, and also to the case of *Campbell-Kawannanakoa* v. *Campbell, supra,* which, bearing on this point, states as follows:

"The trust attempted to be created by the will was contrary to the laws of this state prohibiting the suspension of the power of alienation for a longer period than during the continuance of lives in being at the time of the death of the testator, and was therefore void in its creation as to real property situated within this state. Civ. Code, §§715, 716; In re Walkerly, 108 Cal., 627, 41 Pac., 772, 49 Am. St. Rep., 64. It was also void as to such real property, under our decisions, because it devised the title in fee simple to the trustees to be conveyed by them to the beneficiaries. Estate of Fair, 132 Cal., 523, 60 Pac., 442, 64 Pac., 100, 84 Am. St. Rep., 70; Estate of Sanford, 136 Cal., 97, 68 Pac., 494; Estate of Pichoir, 139 Cal., 682, 73 Pac., 606. * * *

The trust here therefore was void as to the real property of deceased situated within the state of California. It follows that as to such property the deceased died intestate, and the same descended by succession to his heirs at law (Est. of Walkerly, 108 Cal., 627, 652, 660, 41 Pac., 772, 49 Am. St. Rep., 97), one-third to his surviving wife, and one-sixth to each of his four children (subdivision 1, §1386, Civ. Code), subject only to proper administration of his estate.

In the face of these facts, it is idle to assert that no injury resulted to plaintiffs, three of these children, from the acts of defendants. By those acts the property to which they had succeeded under the laws of this state was irrevocably taken from them without consideration under color of valid probate proceedings, and placed in the name and possession of the trustees under the void trust."

And also to *In re Walkerly Estate, supra.*

And for what it is hoped will be for the greater convenience of the Court, the case of *Curtis* v. *Schell, Campbell-Kawannanakoa* v. *Campbell,* and *In re Estate of Walkerly,* have been added to this brief as an appendix thereto.

The Code of California was largely adopted from the Code of the State of New York, and the law of the State of New York on this point is extremely well settled. The leading case on that point is the case of

Manice v. *Manice,* 43 N. Y., 303.

The principle here contended for, however, is perhaps nowhere better examined than in the case of

Underwood, et al., v. *Curtis, et al.,* 127 N. Y., 533,

where the Court, after reviewing the *Manice* v. *Manice* case (*supra*) and other cases, and that of *Shetler* v. *Smith,* 14 N. Y., 328, states:

"It is unnecessary to refer to the cases in which the courts have declared void trusts attempted to be founded for a term measured otherwise than by lives, because in violation of the statute of perpetuities or of the statute relating to accumulations of personal property and expectant estates in such property, but a few cases may be cited which serve to illustrate the various efforts which have been made in the past to evade the rigor of the statute. In *Cruickshank* v. *Home of the Friendless* (113 N. Y., 327) and *People* v. *Simonson* (126 *id.,* 229), the trusts were to continue until the legislature should authorize by appropriate enactment an incorporation such as testator desired should receive the estate; in *Garvey* v. *McDevitt* (72 N. Y., 556)—(to which the court is respectfully particularly referred) the duration of

the trust was sought to be limited to a period of four years immediately after testator's death; in *Killam* v. *Allen* (52 Barb., 605), until the payment and extinction of certain mortgages; in *Moore* v. *Moore* (42 Barb., 257) until the reformation of a person not exceeding three years; and in *Thompson* v. *Clendening* (1 Sandf. Ch., 387) a trust of personalty was created to continue until the sale and distribution of real estate which could not take place until some one of several children became 21 years of age and need not until the youngest child reached majority."

The Court, after considering the indivisibility of the trust under the will under consideration, held the trust to be invalid, and that testator died intestate.

The language used in the case of *Garvey* v. *McDevitt* (*supra*), is peculiarly expressive of the principle contended for as applicable to this case, and, therefore, the exact language of that Court, as quoted, page 564, is submitted as expressive of the defect which exists in the trust in question:

"Therefore, during the four years, there are no persons in being who can convey an absolute fee in possession. The heirs cannot; any conveyance made by them during the four years must be subject to be defeated by the exercise of the power of sale after four years. The executors cannot, because they have no power to sell, or to unite in any conveyance until after four years. During the four years, the power of alienation is absolutely suspended. All man-kind uniting could not convey an absolute title. Hence the power is illegal and the whole scheme of the will * * * must fail."

The whole case on appeal is properly before the Court, and it is respectfully urged that the Court has the power, and in a proper instance, will re-

view every point of law brought before it for its consideration.

Johnson v. *Waters* (*supra*);
Arrowsmith v. *Gleason* (*supra*);
Horner v. *United States*, 143 U. S., 570;
Cary v. *Houston*, &c., *R. R. Co.*, 150 U. S., 170, 181;
Chappell v. *United States*, 160 U. S., 499;
Davis & Farnum Mfg. Co. v. *Los Angeles*, 189 U. S., 207.

And it is respectfully urged upon the Court that in a case where such gross concealment has been practiced upon the Court below, where that has been followed by the evident intent to make it as difficult as possible for the complainant to have any notice that such a proceeding was being brought, and make it as difficult as possible to properly protect his rights, that a court of equity will interfere in his behalf, set aside the decree of the California Superior Court, and restore him to his rights in the properties there held in trust, and afford him such relief by deciding each and every point involved as to make his right and title thereto once and for all decisive and complete.

All of these provisions of the Code have been considered in the case of *In re Walkerly*, 108 Cal., 627.

Under this decision just cited, it would be beyond question that this trust would have been void had the property been devised to a trustee *eo nomine*, to hold for this indefinite period of three years. The only question, really, then, is whether or not the direction deferring the distribution of the estate for this definite period of three years is in contravention of the statute? We will hereafter consider the case of the *Estate of Pforr*, 144 Cal., 122, cited by the defendants on the argu-

ment below, and show wherein that case is radically different from the case at bar. Before citing any authorities, we submit the general observation that if the provisions of this will take it out of the restrictions of the statute against perpetuties, that statute has been passed in vain, because in order to avoid it, it is only necessary to tie property up before the final decree in the estate is rendered. It is perfectly apparent from an examination of these provisions of the will that, if valid, they as effectually create a trust estate as though the devise were to a trustee *eo nomine*, to be effectuated by a decree of distribution. In the first place the limitation is for a definite length of time, not measured by the continuance of lives in being. In the second place, the title to the trust estate is, by the terms of the will, vested in the executor. The will itself is perfectly clear on this point, and it has besides been so held by our Supreme Court.

Estate of Williams, 92 Cal., 183.

See, also in this connection:

Bennalack *v.* Richards, 116 Cal., 405.
Estate of Delaney, 49 Cal., 76.

In the third place, the trustees, during this definite period of time, had an active duty to perform in managing the trust estate, and fourthly and finally, the will provides for the accumulation of the income during this period of limitation.

In this connection we call the Court's attention to the fact that there is no gift to any of the beneficiaries, as tenants in common, or jointly, of an undivided interest, but a distinct intention is manifested that each of the beneficiaries shall receive a specific segregated share; shall take it individually; shall hold it individually and separately,

and shall not take it until it is severed by the method of appraisement and distribution provided for in the will, upon the expiration of the period of limitation. Futurity is thereby annexed to the substance of the gift. Until the period of division arrives, neither of the beneficiaries can take the separated share, which alone the testator intended should be taken. Meanwhile, there is a trust estate in the trustee, which he cannot *aliene*, for it is bound to him during the term, and the beneficiaries cannot *aliene* so as to convey the property in possession, free from the trust estate. Therefore, it seems to us to follow conclusively that there is a violation of our statute against perpetuities.

See *Staples v. Hawes*, 39 Appellate Division (N. Y.), 552, which we have quoted and adapted.

In the *Estate of Steele*, 124 Cal., 533, these provisions of our Code were before the Court for consideration, the Court having to construe the provision of a will as follows:

"Under item three, Subdivision G, the trustee is directed to pay to each of said three children, as they respectively attain majority, one-ninth of the value of the trust property, the value to be ascertained by an appraisement, under authority of the proper Court, at the time when the eldest of said three children shall attain her majority," and the Court held that this was not in violation of the statute, because the trust did not survive the death of the beneficiaries, but said, 'If the real language had been that an appraisement and distribution could not be made until the eldest child attained her majority,' 'or would attain her majority, if living,' a definite time would be fixed, not dependent upon a life, or lives in being, before which there could be no distribution, and in such case, the trust would be void,' which, of course, is exactly the case at bar."

In the case of *Farrand* v. *Petit*, 84 Mich., 671, the provision in the will was, "I direct * * * that the remainder thereof (of my estate) shall be kept by my executors for twenty (20) years after my decease, when the same shall be divided and distributed as follows"; and it was held that this was void as attempting to suspend the power of alienation, contrary to the provisions of the statute.

In the case of *Brandt* v. *Brandt*, 34 N. Y., Supp., 684, the fourth paragraph of the will attempted to create a trust, the executors to receive the rents, issues and profits of the real and personal estate and deposit said income in a savings bank until the expiration of ten (10) years from the death of the testatrix, when the trustees were authorized to sell the property and divide the proceeds, as well as the moneys accumulated during the period named, among the children of the testatrix. The court held that the suspension being for an absolute period, the disposition attempted to be made and the trusts the testatrix undertook to create were unauthorized and void. In this case the Court cites *Rice* v. *Barrett*, 102 N. Y., 161, and quotes from page 164 of that decision as follows:

"It is apparent that the testator intended that his residuary estate should remain in the hands of his executors for the simple purpose of accumulation for the period of ten (10) years, after his death. The trust is not made determinable with, or within any two ascertained lives, nor is it limited by life, but during the whole of that fixed term, the estate is inalienable, although all mankind should join in the conveyance. The direction concerning it, therefore, is in violation of the statute, which in its terms prohibits such suspension by any limitation or condition whatever, for a period longer than two (2) lives in being, etc."

In the case of *Kalish* v. *Kalish*, 166 N. Y., 368, cited by defendants, to which we will again refer hereafter, a provision similar to the one at bar was before the Court, and the Court held that the attempt on the part of the testator to delay the final distribution of his estate was, if valid, the creation of an active trust and therefore that it was in violation of the Statute of Perpetuities, and void.

In the case of *Garvey* v. *McDevitt*, 72 N. Y., 556, the will directed that the executors, at the expiration of four (4) years after the decease of the testator, sell his real estate and pay over the proceeds to the Bishop of A., upon a certain trust specified, and until the sale, should rent the real estate, and after paying the taxes, assessments, etc., deposit the balance of the rents in the savings bank, to be paid with the proceeds of the sale of the real estate, together with the residuary personal estate to said Bishop, upon the trust mentioned, and it was held that this was an attempt to create an active, express trust, which, if valid, would vest the title in the trustee, and as neither the trustee could alienate the lands during the trust term, nor could the *cestui que trust* dispose of his interest, there was a suspension of the power of alienation not limited by life, and so void.

See also,

Haynes v. *Sherman, et al.*, 117 N. Y., 433.
In re Snider's Estate, 21 N. Y., Sup., 430.
Trowbridge v. *Metcalf*, 5 Appellate Division, N. Y., 318.

Defendants say it is apparent that if all of the children of the testator had died within four months after his death the trust term would have ended; their children or the remaindermen provided by the will would have succeeded to the full title to the estate coupled with the right of posses-

sion, and might have petitioned for partial distribution; but we submit that this is not "apparent"; if it were, that would be the end of the discussion, for then the estate would be limited upon lives in being, and consequently valid. On the contrary, it is perfectly apparent that such was *not* the intention of the testator, and that has *ex industria* expressed a contrary intention. He has attempted to create a distinct trust for this period. The title is vested in his trustee, he is given power to carry on his business, to borrow money, to bargain and sell his real and personal property, and during this period he has provided for practical accumulation of the income, as his daughter was to receive but two hundred and fifty ($250) dollars per month, and each of his three sons one hundred ($100) dollars. Furthermore, he has made no provision for the disposition of his property in case of the death of his children before the expiration of this trust period. The life estates for the children are not carved out of the entire estate, but are in specific portions after segregation. All of the remainders and contingent remainders, attach only to the "estate set aside" to each child by the method of appraisement and distribution provided by the will.

Item thirteen is merely intended to explain the testator's intention after distribution, for throughout this paragraph we find that he is treating merely of the estate "set aside" by distribution. According to this, it is only the estate "set aside" for a child that vests in his or her heirs upon his or her death. The contingency of the death of a child before distribution is nowhere contemplated or provided for. The trust for the three years is absolute, and is a clear violation of the estate.

Nor can this be regarded as a mere administrative provision. This is, we think, perfectly clear

from what has already been said, but repetition will do no harm.

It will be observed first, that the appraisement and distribution provided for is not the ordinary probate procedure, which in itself is an all-sufficient answer to this contention. We must remake the testator's will if we hold that this is but an administrative provision which can be disregarded.

And as we have already pointed out, the title was to be vested in his executor; he had an active trust to perform; he was given the power of sale, and during this period the income from the property was to be accumulated. Finally, it is not even clear from the provisions of the will that this "distribution" is to take place in the probate proceedings. Certain it is that there might have been a probate distribution without interfering with this part of the testamentary scheme.

A very cursory examination of the case *In re Pforr's Estate,* 144 Cal., 122, as cited by defendant, but which can now be found in Vol. 77 Pac. Rep., 825, will show that it has no application to the case at bar. We find in this case everything that was not contained in that case. The Court says:

"The will in question does not create an express trust in real property. The testator has not devised his land to his executors in trust for the purposes of his will, but has merely given them certain directions to be observed in carrying out its provisions. To the extent that these directions are inconsistent with law, they are nugatory. Executors, as such, are not trustees of an express trust (Civil Code, Sec. 2250), and the authority which the testator herein has given to his executors creates only such a trust as pertains to the office of executor. *Bennalack* v. *Richards,* 116 Cal., 405; 48 Pac., 622."

"He has not conferred upon them the power to

make any sale or disposition of his estate other than that they 'shall have the property sold' at the expiration of two years after his death, and shall distribute the proceeds among his designated beneficiaries. The sale which is thus directed to be made by them as executors of his will and as a part of their administration of the estate and not as the trustees of an expressed trust and will be ineffectual without a confirmation by the Court. (Code of Civil Procedure, Secs. 1570-1571.) Whereas, if the land had been devised to them in trust to make the sale and distribute the proceeds, it could be sold by them, as such trustees, without the necessity of reporting the sale or having it confirmed.

* * * * * *

"The testator has not forbidden the alienation of his estate during any fixed period of time, but in his directions to his executors he has fixed a limit after which the beneficiaries may enforce its sale. It was not within his power to deprive the Superior Court of its power to direct a sale of his estate at any time, if necessary, for the purposes of administration, nor is his will susceptible of such construction. So long as the administration of the estate is pending, the executors are at all times subject to the control and direction of the Superior Court, and this Court may, at any time, order a sale of the lands, if necessary for the payment of creditors, or when it will be for the advantage of those interested in the estate, or when they assent to its sale. (Code of Civil Procedure, Sec. 1543.) There is, therefore, no point of time at which the beneficaries under the will may not unite in a conveyance made at a sale under an order of the Court and thus give to the grantee an absolute interest in possession in the estate of the testator in the property conveyed."

In the case at bar, as we have already said, all of the elements not found in the Pforr estate are

presented. Without enumerating them all, it is sufficient to say that the title to the property is vested in the executors as trustees of an express trust. During this absolute period of three years, the beneficiaries could not sell, as the title was not vested in them, and the executor, without contravening the terms of the trust, could not sell, except to exchange the trust property for other property to be held upon the same trust, or to reinvest the proceeds, to be held upon the same trust, which is not sufficient to take the case out of the statute (*Civil Code*, Sec. 771), so that during this period of three years, there is an absolute restraint upon the power of alienation, and consequently these provisions of the will are void.

It is finally contended by the defendants that even if these trust provisions of the will are invalid, still that they may be disregarded and the remaining parts of the will stand. The law involved in this contention is perfectly well settled; The only question is its application. As is said in the case of *Carpenter* v. *Cook*, 132 Cal., 621:

"It is a familiar principle that if several trusts are so inextricably interwoven, so mutually interdependent that the destruction of one mutilates and maims any essential parts of the trust scheme, the whole must fail."

See also:

Estate of Steele, 124 Cal., 541.
Ward v. *Ward*, 105 N. Y., 68.
Greenland v. *Waddell*, 116 N. Y., 234.
Staples v. *Hawes*, 39 App. Div., N. Y., 552.
Brandt v. *Brandt*, 34 N. Y., Sup., 684.
Garvey v. *McDevitt*, 72 N. Y., 556.
Hayes v. *Sherman*, 117 N. Y., 433.
Matter of Tilden's Will; Tilden v. *Green*, 130 N. Y., 29-50.

Rice v. *Barrett*, 102 N. Y., 161.
Estate of Fair, 132 Cal., 523.

In the case at bar, it is, we contend, perfectly clear that this trust is an inseparable part of the testamentary scheme. During this period of three years, or longer if considered necessary by his executor, it was the intention of the testator that his property should be kept intact and that the income thereof should be allowed to accumulate. As was said in the case of *Rice* v. *Barrett, supra:* "It is apparent that this accumulated fund will furnish the only support for the devises subsequently made." Furthermore, as we have already pointed out, there is no alternative disposition of the property provided in case of the death of any child before the expiration of the trust period. It would seem that the testator intended to die intestate in case of the death of any child before the expiration of this period, and to eliminate this and accelerate the remainders, would be to entirely change the testamentary scheme.

The case mainly relied upon by defendants in support of their contention is that of *Kalish* v. *Kalish*, 166, N. Y., 368. This case recognizes the general principle which we have stated above, but holds, and that under the peculiar circumstances of that case, the intermediate trust can be disregarded without destroying, or changing, in its essential features, the general testamentary scheme. The Court points out that the only part of the testamentary scheme that will fail is that which attempts to defer the time of the distribution for five years, during which the daughters are to have their annuities and the use of the homestead, or a substitute therefor, and during which another daughter is to have her annuity, and then shows

that the annuity and income from the different portions of the estate would be practically the same. In the case at bar, however, as we have already pointed out, the trust provisions cannot be disregarded and the testamentary scheme carried out. The management of his estate, by his executor as trustee, under an expressed trust is a necessary part of the testamentary plan. The testator evidently considered it necessary that his property should, in all events, be kept intact for that period and the income therefrom be allowed to accumulate, in order to make possible the ultimate disposition of his property. If this trust, however, is to be disregarded, then, in case of the death of a child during this period the immediate distribution of his estate could be had, and there would be no accumulated fund to carry out the subsequent provisions of his will.

The defendants under this general heading have made the point that there would be a merger of the different trusts under this will. This seems to us, however, clearly to beg the question. Where there are two trusts, both valid, and one is comprehensive enough to embrace the other, unless the intention of the testator is clear, there would undoubtedly usually be a merger; but this is on the assumption that both trusts are valid. If this primary trust was invalid, as we contend, it could not be validated upon any principle of merger. There is no principle of mathematics by which a finite quantity can be augmented by the addition of zero. Nothing cannot be lost in something, so a void trust cannot be merged into a valid one. But before there is any application of the principle of merger, it must first be determined whether or not this primary trust is valid. The only question is, was this trust valid or invalid, and if invalid, may it be disregarded and the testamentary scheme still stand? We contend that

it is an invalid trust, and we have already shown, we think, that it is a necessary part of the testamentary scheme, which cannot be disregarded.

Nothing can be clearer than the intention of the testator that his children should take no interest of any kind in his property until the termination of the first trust, (a period of 3 or 5 years, we will call it 5 because it was extended to that term).

During those five years they were not beneficiaries. The whole estate was vested in the Trustee. Before they could become beneficiaries three events must happen.

(a) They must be living at the expiration of the three-five years.

(b) A portion of the estate must be then selected from which their beneficial interest would be derived.

(c) This portion must be "set aside" by decree of the Court.

Now supposing one of them dies during those five years. It follows that no selection or "setting aside" could be made for him.

One of them, Percy, did die within the five years. By the terms of the will he would if living have been entitled to $100,000 worth of the property, and one-third of the remainder over $300,000 worth (by the appraisment) as the source of his beneficial interest. This proportion of the estate at his death was undisposed of by the will and passed to the heirs at law. Thos. H. W. J. and Mary (Bryant could not inherit by the terms of the will). Therefore Mary and Tom became each seized in fee of over two hundred thousand dollars worth of the property—relieved

of all trust, and Mary was so seized when she died intestate and one half passed by descent to Hansford Johnson, her son, and the other half to George G. Goodrich, her husband.

It will be noted that the will contains no residuary clause. Goodrich therefore takes if the will is valid.

It is fair to assume that the object of the Testator in postponing the interest of the children in his estate until the expiration of five years was two-fold.

(1) That during that time the estate might increase by accumulation.

(2) That his children all being young, (Bryant was an infant at his death) he wished that the temptation and responsibility of large incomes should not be cast upon them until they were more mature.

Certain it is that his intention was that their beneficial interest should *not* be created until the expiration of that time, and to give them an earlier interest would be to make a new will.

And herein is the distinction from the Kalish Case. In that case the beneficiaries took the same beneficial interest from the testator's death whether the distribution was postponed or not. In other words the illegal provision could be cut out and still the intention of the Testator carried out.

If the illegal trust in our case be eliminated it will entirely defeat the two paramount intentions of the Testator above set forth.

We have thus seen that the Testator took every precaution that his children should have no in-

terest in his estate, not even as beneficiaries, until the expiration of the five years, and then only upon the happening of conditions.

When we said there was no residuary clause in the will we meant there was no disposition made of any lapsed legacy or property affected by illegal or impossible provisions of the will.

Let us now consider what the will attempts to do with the property *during* the five years.

Before doing so let us bear in mind that in California all uses and powers were abolished in 1872 except the power of sale in a mortgage, and the only trusts permitted were the express trusts enumerated in section 857 of the Civil Code, which will be hereafter more particularly referred to.

THE TRUST FOR THREE-FIVE YEARS.

The California Supreme Court aptly remarks (*In re Walkerly*) (see our brief, page 182) that in a valid express trust in California five essentials are necessary,

(a) A Trustee.
(b) An estate conveyed to him.
(c) A beneficiary.
(d) A legal purpose.
(e) A legal term.

And that although the Court in certain cases might supply the first requisite, if the second or third be lacking or the fourth or fifth be illegal, the trust itself must fail.

We will analyze this 5-year trust by this rule.

FIRST.—(a) A TRUSTEE, and (b) AN ESTATE CONVEYED TO HIM. The will reads (item 8), "Thereby

"appoint my brother, George E. Williams, execu-
"tor of this will." * * (Item 9) "Thereby de-
"vise that all the property, of which I die the owner * * * vest absolutely in my executor herein appointed * * * to hold said property, and every part thereof, in trust for the uses and purposes in this will mentiond, and for the use and benefit of my children as herein provided." (T. of Rec., p. 23).

This is an absolute devise in trust to Geo. E. Williams, *eo nomine*.

The decree of distribution shows the property devised. So that the first two (a) and (b) requirements of the trust were satisfied.

SECOND.—(c) A BENEFICIARY. There is no beneficiary to the three-to-five year trust.

THIRD.—(d) A LEGAL PURPOSE. The purpose is found in item 10 of the will (T. R. 23). 1. "To carry on all business, in which I was engaged at the time of my death." 2. "To borrow money for the use of such business, or the benefit of my estate." 3. "To bargain, sell and convey, any portion, or part, of the property, of my estate without any order of Court or other proceeding, and to execute all mortgages or conveyances necessary, or deemed proper by him." "And" (T. R. 24) "to have all income of my estate or sales of property, invested in property, government securities, or in notes, bonds or mortgages, for which property has been sold, at the time of distribution"—the end of the five years.

Now we have seen that under the California laws this must be an express trust under Section 857 of the Civil Code, or it is nothing.

This section (857) reads as follows: "For

"what purpose express trusts may be created. "Express trusts may be created for any of the "following purposes:

"(1) To sell property and apply or dispose "of the proceeds in accordance with the instru- "ment creating the trust.

"2. To mortgage or lease real property for the "benefit of administrants or other legatees, or "for the purpose of satisfying any charge "thereon.

"3. To receive the rents and profits of real "property and apply them to the use of any per- "son, whether ascertained at the time of the cre- "ation of the trust or not, for himself or for his "family, during the life of such person, or for "any shorter time, subject to the rules of title 11 "of this part, or

"4. To receive the rents and profits of real "property, and to accumulate the same for the "purposes and within the limits of the same "title."

The "limits" for accumulations are found in sec. 723 and sec. 724, Civil Code and are as follows:

Civil Code 723. "Accumulations when Void. "All directions for the accumulation of the in- "come of property, except such as are allowed by "this title are void." Sec. 724. "Accumulation "of income. Accumulation of the income for the "benefit of one or more persons may be directed "by any will or transfer in writing sufficient to "pass the property out of which the fund is to "arise as follows:

"(1) If such accumulation is directed to com-
"mence on the creation of the interest out of
"which the income is to arise, it must be made
"for the benefit of one or more *minors* then in be-
"ing, and terminate at the expiration of their
"minority, or

"(2) If such accumulation is directed to com-
"mence at any time subsequent to the creation of
"the interest out of which the income is to arise,
"it must commence within the time in this title
"permitted for the vesting of future estates,* and
"during the minority of the beneficiaries and
"terminate at the expiration of such minority."

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*lives in being.

It will thus be seen that the accumulation directed in the Williams will is illegal, apart from the fact that it creates a perpetuity. And here again we see that if the will be upheld this income for five years is undisposed of by the will, that it passed to the heirs of whom Mary, the wife of Goodrich, was one, and forms another fund in which Goodrich as heir of the wife has an interest and claim upon the estate.

It is also apparent that no express trust is permitted to carry on Testator's business for five years, or is there any purpose which makes it an Express Trust under the law as cited.

Consequently the fourth requirement—a legal purpose in the three to five-year trust is lacking.

FOURTH.—(e) A legal term.

This is already fully discussed in our brief and it is only necessary to say that it is lacking.

To sum up. In analyzing the three-five year trust we have found

(a) A trustee with a fee devised to him.
(b) An estate conveyed to him.
(c) No beneficiary.
(d) An illegal purpose.
(e) An illegal term.

Thus we see that the Court in order to sustain the three to five year trust must supply:

(1) Beneficiaries, of whom Sherrod would be one, and this contrary to the intention of the testator (item 5 of will); and contrary to the intention of the testator that no child should become a beneficiary except after five years, and the "setting aside" of the portion of the estate from which he should derive his beneficial interest.

(2) It must supply a legal purpose for the trust and declare that the testator's intention that the trustee carry on his business and accumulate the profits and rents and issues cannot be carried into effect. What can the Court direct him to do with it unless simply to hold it for five years until distribution, in which case he would be in the same position as the trustees in Cruickskank *v.* Home of the Friendless (113 N. Y., 327), cited on our brief, page 60, where the trustees were to hold the property until the legislature authorized the formation of an eleemosynary institution to whom the property was devised, and in which case the estate of the trustees was declared void and the devise defeated.

(3) The Court cannot accelerate the creation of the beneficial estates in the children without violating the most clearly evinced intention of the testator.

(4) The Court cannot convert the illegal term of three or five years into a legal term.

(5) The Court cannot hold the three-five year trust an administrative provision merely, because

(a) Executors do not have devised to them an absolute fee.

(b) Executors do not carry on the business of the testator for three or five years.

(c) Executors do not have the power given to them to sell any of the property of the estate without an order of the Court.

(d) Executors do not accumulate the rents and profits for three or five years certain. Their powers must be performed within a year, and carrying on the business for a definite period, selling without order of Court, accumulating for a definite period and holding an absolute fee in the realty is no part of their duty or prerogative. (See Est. of Glen, 35 California Dec., 180.)

The will is bad from every aspect and the necessary effect of its invalidity is that the testator died intestate as to all the property affected by this trust.

While we, therefore, contend with the utmost confidence, that under the California Code, as construed by the Supreme Court of California, the trust attempted to be created by said will is and was void from the beginning, we by no means desire to be understood as contending that such invalidity is necessary or essential to the exercise of the equity jurisdiction invoked by the bill or to the relief prayed for therein.

On the contrary, complainant, as heir at law of Mary Bryant Goodrich, is entitled to recover under the bill whether the trust be void or valid.

It does not appear that the income given to Mary Bryant has been paid or that $200,000 given to her absolutely has been paid. And the most cursory reading of the consent decree under which Frank Hansford Johnson obtained 40% of the entire estate in fee will disclose the fact that, to have obtained this percentage when the will gave him only $1,000, his position as heir at law of Mary Bryant Johnson must have been utilized to its full limit.

V.

The case of Broderick's Will, 21 Wall, 503, first cited by the lower court in its opinion (Trans. Rec., p. 79), is not in point. That case, in 1874, decided that "a court of equity would not entertain jurisdiction of a bill to set aside a will, or the probate thereof." We are not seeking to set aside the probate of the will of Thomas H. Williams. This court in administering the law in equity cases will administer it, in cases of which it has

general jurisdiction, in accordance with recognized principles of equity. It announced this doctrine in clear and forcible terms in the Arrowsmith case, 129 U. S., 86. All questions as to such jurisdiction in cases of void trusts, where extrinsic fraud was practiced in probate proceedings, are set at rest under the California laws by the decision of the Supreme Court of California in Campbell-Kawannanakoa, *et al., v.* Campbell, decided October 9th, 1907, cited *supra,* and reported in 152 Cal., 204; 92 Pac., 184. The Court says:

"Defendant's counsel do not appear to seriously dispute that such acts would constitute a fraud, but they urge that inquiry in regard thereto is barred by the orders of the Superior Court authorizing the purported sale, confirming the purported sale and distributing the purported proceeds. The jurisdiction of courts of equity to afford appropriate relief from judgments generally, and from such orders and decrees in probate proceedings as are here involved, when obtained by certain kinds of fraud, is too well established to be questioned. See Bacon *v.* Bacon, 89 Pac., 317, and cases there cited. Where the judgment or order assailed is of such a character that a court of equity may not properly set it aside, it may nevertheless prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary, or his successor, with notice, a trustee for the defrauded party."

The court then holds that the bill in equity in such cases is not a collateral, but a direct attack upon the orders, and the court cites, among other cases, the late case of Arrowsmith *v.* Gleason, 129 U. S., 86. In the later case this court says, p. 99:

"While there are general expressions in some

cases apparently asserting a contrary doctrine, the latter decisions of this court show that the proper court of the United States may, without controlling, supervising or annulling the proceedings of State courts, give such relief, in a case like the one before us, as is consistent with the principles of equity;"

and further, on page 100 this court approvingly quotes from Bowen *v.* Evans, 2 H. L. Cas., 257-281:

"If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances considered of a decree of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud";

and on p. 101, after citing cases:

"These principles control the present case which although involving rights arising under judicial proceedings in another jurisdiction, is an orginal independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice, in procuring from it authority to sell an infant's lands, where there was no necessity therefor, but actual fraud in the exercise from time to time, of authority so obtained."

It should also be noted that the case next relied upon by the lower court in its opinion is Toland *v.* Earle, reported in the same volume as Curtis *v.* Schell, to wit, 129 Cal., 148. But the Court seems to have been in error in depending upon this case, because in the Toland against Earle case (*supra*), there was no question whatever of extrinsic fraud

practiced upon the Court, and so it would seem to have been inapplicable. Since the decision in the case of Curtis *v.* Schell (*supra*), the Supreme Court of California has had occasion to pass upon the question raised upon this appeal in three separate instances, which fully illustrate and establish the attitude of that Court upon the Point in question. These three cases are those of

Campbell-Kawannanakoa v. *Campbell,* 152 Cal., 201;
Bacon v. *Bacon,* 150 Cal., 477;
Keating v. *Smith,* Cal. Decisions, Ad. Vol. 36, No. 1921;
Pacific Reporter, Vol. 5, No. 97, p. 300. (Not yet in bound form).

In the first of these cases, Campbell-Kawannanakoa *v.* Campbell, (*supra*), it is held that extrinsic fraud will warrant equitable relief.

Bacon *v.* Bacon (*supra*), holds that equity will review a judgment after fraud or mistake; and that such review is a direct proceeding against the judgment and not a collateral attack.

The Keating *v.* Smith case (*supra*), on the other hand, is a case in line with the case of Toland *v.* Earle (*supra,*) where there was neither fraud nor mistake, and where, of course, the decree would not be disturbed.

The Supreme Court of the United States passing upon this question has repeatedly held a complainant-appellant to be entitled to equitable relief, where extrinsic fraud has been practiced upon the Court below.

Johnson *v.* Waters, 111 U. S., 640;
Arrowsmith *v.* Gleason, 129 U. S., 86;
Fielden *v.* Illinois, 143 U. S., 452;
Willard *v.* Wood, 135 U. S., 309;
Nashua & Lowell R. R. Corp. *v.* Boston & Lowell R. R. Corp., 136, U. S., 382.

VI.

We particularly call attention to the wording of a portion of the verified petition of Frank S. Johnson, as guardian of the estate of Frank Hansford Johnson, set forth in the amendment to the bill of complaint (Trans. Rec. p. 66) as follows:

"That all of the children of the said Thomas H. Williams, named in said will, excepting Thomas H. and Mary, have died without issue, and that Mary, the daughter of said Thomas H. Williams, mentioned in said will, has died, leaving one child, the said minor, who is the sole issue of said Mary and your petitioner, *who were husband and wife.*"

Not one word said about the fact that Mary Bryant and Johnson had been divorced; not one word said, informing the Court that Mary Bryant and Frank S. Johnson were not husband and wife at time of her death; not one word informing the Court that she died *Mary Bryant Goodrich.* If appellant had no interest in the matter, why this artful wording from which the Court must unquestionably draw the inference that the husband of Mary, at the time of her death, and the petitioner, were one and the same? Taken in connection with the oft repeated allegation that George E. Williams, Thomas H. Williams, Jr., and Frank Hansford Johnson were the only parties in interest, the extent of the imposition practiced in obtaining said consent decree becomes apparent from this language. With such extrinsic fraud practiced, and often repeated in the proceedings for the consent decree; with the express written admission of the petitioners, in their petitions, that the whole matter had been disposed of by agreement out of court, between all the parties in

interest, rendering it unnecessary for the Court to pass upon the "complicated questions of law and fact" otherwise involved; with the effect of this fraudulent imposition in obtaining the consent decree appearing on the face of that decree in the following verbatim quotation from it (Transcript p. 27);

"And it appearing to the satisfaction of the Court that Mary Bryant Williams, named in said last will and testament of said decedent, was a daughter of said testator and *that during her lifetime she was married to Frank S. Johnson,* and that thereafter and subsequent to the admission to probate of said last will and testament of said decedent, *the said Mary Bryant Johnson (born Williams) departed this life,* leaving her sole remaining issue Frank Hansford Johnson, hereinbefore mentioned, a minor"; with the uncontradicted and uncontrovertible fact appearing from the decree itself, that it was purely a consent matter, based upon such petitions, it is apparent that such decree of distribution did not adjudicate appellant's rights, or pretend to adjudicate them, and that such decree was and is not *res adjudicata* of appellant's interest, the extent of his rights, or of the validity of the trust.

In *Lamb* v. *Gatlin,* 1 Dev. & Batt. Eq., 37, approved by this court in *Lawrence Mfg. Co.* v. *Jonesville Cotton Mills,* 138 U. S. 552, Gaston, *J.*, says, in considering the effect of a consent judgment by an executor, and holding it not binding upon the beneficiaries:

"It is not in truth a decision rendered *in invitum,* and by a judgment of the Court to which defendant was compelled to submit, and which therefore not only binds him, but those also for whose benefit he held the estate, unless it can be impeached for fraud, but it is a voluntary settle-

ment between the defendant and the persons then claiming, *which the parties to that settlement have chosen to invest with the forms of a judicial determination.* The decree is avowedly adopted because it was made by the parties. A decree thus rendered as against the present plaintiffs who were principals whom the defendant in the consent judgment represented, has no force except so far as it is seen to be just."

To like effect are:

Russell v. *Place*, 94 U. S., 606;
Union Bank, etc., v. *Commissioners*, 119 *N. C.* 214; 34 L. R. A, 487.
Commissioners of Brownsville v. *Loague*, 129 U. S., 493;
Kelley v. *Milan*, 127 U. S., 139;
Gay v. *Parport*, 106 U. S., 679.

On the authority of the foregoing decisions, we say that, in equity and good conscience, the appellees who practiced this imposition, should not be permitted to retain the fruits of their fraud because that fraud was practiced under the guise of probate proceedings and was disguised under the mask of a judicial decree.

We therefore pray for a reversal of the final decree of the trial court with directions to enter a decree for appellant in accordance with the prayer of the bill.

Respectfully submitted,
HENRY ARDEN,
Solicitor for Appellant.

JOHN G. JOHNSON,
TYSON S. DINES,
L. SIDNEY CARRÈRE,
Of Counsel for Appellant.

APPENDIX A.

IN THE CIRCUIT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF CALIFORNIA.

GEORGE G. GOODRICH v. JOHN W. FERRIS *et als.*	Bill of Complaint

In the Circuit Court of the United States for the Northern District of California, in the 9th Judicial Circuit. In Equity.

To the Judges of the Circuit Court of the United States for the Northern District of California, in the 9th Judicial Circuit:

George G. Goodrich of New York City, and a citizen of the State of New York, brings this, his bill against John W. Ferris, individually and as trustee, of San Francisco, a citizen of the State of California; Frank Hansford Johnson, an infant; Frank S. Johnson as guardian of the estate of said Frank Hansford Johnson, both of San Rafael, in the County of Marin, State of California, and citizens of the State of California; Thomas H. Williams, Jr., of San Francisco and a citizen of the State of California, Thomas H. Williams, 2d, an infant under the age of 14 years, who resides with his father, said Thomas H. Williams, Jr., at the City and County of San Francisco, State of California; Georgie E. Williams, a citizen of California, Jennie E. Williams, a citizen of California, heirs at law of George E. Williams, deceased; and thereupon your orator complains and says: That your orator

is a resident of the City of New York and a citizen of the State of New York; and that the said John W. Ferris of San Francisco, Frank Hansford Johnson, an infant, Frank S. Johnson as guardian of the estate of said Frank Hansford Johnson, Thomas H. Williams, Jr., Thomas H. Williams 2d, an infant, Georgie E. Williams, and Jennie R. Williams are all residents and citizens of the State of California; that the said Frank Hansford Johnson is an infant over the age of 14 years, and that the said Thomas H. Williams 2d, is an infant under the age of 14 years.

And your orator further shows unto your Honors, that on the 28th day of February, 1886, one Thomas H. Williams, a resident of the City and County of San Francisco, and a citizen of the State of California, departed this life at the said City of San Francisco, seized and possessed of a large amount of real property, situated in the Counties of San Joaquin, Sacramento, Solano, Contra Costa, Yolo and in the City and County of San Francisco, in said State of California; more particularly hereinafter described and set out in the decree of distribution hereunto annexed, marked "C" and made a part of this bill, and that, at the time of his death, he left no wife him surviving, and that his only heirs at law were his children and lawful issue, namely:

Sherrod Williams, a son, of full age; said Thomas H. Williams, Jr., a son of full age; Mary Bryant Williams, intermarried with said Frank S. Johnson, a daughter of full age; Percy Williams, a son, of full age; and Bryant Williams, a son over twenty years of age, all born in lawful wedlock, and whose mother was dead; that upon the death of said Thomas H. Williams, that part of his real estate situated in the State of California, of which he died intestate, as hereinafter set forth, passed to and vested one-fifth in each of said children.

And your orator further shows unto your Honors, that the said Sherrod Williams departed this life on or about the 2nd day of August, 1888, leaving no wife or lawful

issue, him surviving, and leaving his said sister Mary B. and his said brother, the defendant, Thomas H. Jr., and his said brother Bryant, and his said brother Percy him surviving, who, under the laws of California and particularly section 1386 of the Civil Code thereof, became and were his only heirs at law, and his real estate situated in the State of California, passed to, and vested, one fourth thereof in said Mary B. Goodrich, the wife of your orator, and one-fourth thereof in said Bryant Williams, and one-fourth thereof in said Thomas H. Williams, Jr., and one-fourth thereof in said Percy Williams.

And your orator further shows unto your Honors, that the said Percy Williams, was, on the 1st day of August, 1888, lawfully married to one Bessie L. Trahern Williams, at the City of Stockton, and that there was issue of said marriage, one child, born November 12th, 1889, who departed this life on February 16th, 1890.

"That said Percy Williams died on or about the 3d day of October, 1890, being at the time of his death a resident of the County of San Joaquin, State of California; that he left a will by the terms of which he devised and bequeathed all of his property and estate to his widow, one Bessie L. Trahern Williams, and appointed the said Thomas H. Williams, Jr., executor of such will; that said will was by an order of the Superior Court of the State of California, in and for said County of San Joaquin, duly given and made on the—day of——, 1890, admitted to probate as the last will and testament of said Percy Williams, deceased, and the said Thomas H. Williams, Jr., was appointed executor thereof, and he having qualified as such, letters testamentary were issued unto him by the clerk of said court on the—day of——, 1890, which have never been revoked, and he has ever since been and still is the duly appointed, qualified and acting executor of said will of Percy Williams, deceased; that, as complainant is informed and believes and upon such information and belief alleges the said Thomas H. Williams, Jr., has acquired all the right, title and interest

of said Bessie Trahern Williams of, in, and to the estate of said Percy Williams, deceased, which comprises all of the interest of the latter in the estate of said Thomas H. Williams, deceased, and he, said Thomas H. Williams, Jr., now claims to own the same."

And your orator further shows unto your Honors, that the said Bryant Williams, then of full age, departed this life at the said City of San Francisco on or about the 2nd day of May, 1893, unmarried, and without lawful issue, leaving him surviving his sister, the said Mary B. Goodrich, the wife of your orator, and his brother, the defendant, Thomas H. Williams, Jr., who, under the laws of California, and particularly section 1386 of the Civil Code thereof, became and were his only heirs at law, and his real estate situated in the State of California, passed to and vested, one-half thereof in said Mary B. Goodrich and one-half thereof in said Thomas H. Williams, Jr.

And your orator further shows unto your Honors, that prior to the death of said Thomas H. Williams, said Mary Bryant Williams, afterwards the wife of your orator, intermarried with the defendant, Frank S. Johnson, and had issue of her marriage with him, one son, the defendant Frank Hansford Johnson, who is an infant, now of the age of about eighteen years.

That in an action brought in the Superior Court of the County of Marin, in the State of California, wherein said Frank S. Johnson was plaintiff and said Mary B. Johnson was defendant, such proceedings were had, that the said Court, which had jurisdiction of the parties and subject matter of said action, made a decree on the 29th day of December, 1888, dissolving said marriage relationship between them, and granting a divorce; which decree was duly entered in said action, and recorded in the Clerk's office of said Court and County on the 2nd day of January, 1889, as by said decree and the said record thereof, reference being thereunto had, will more fully appear. That thereafter, and on or about the 7th day of December, 1889, at the City of New York, the said

Mary Bryant Williams, the divorced wife of said Frank S. Johnson, was lawfully married to your orator, the complainant, George G. Goodrich; that she departed this life at said City of New York, on or about the 3rd day of October, 1893, leaving her surviving your orator, her husband, and her son, the defendant, Frank Hansford Johnson, who, under the laws of California and particularly under section 1386 of the Civil Code thereof, became and were her only heirs at law, and her real estate situated in the State of California, passed to and vested, one-half thereof in your orator, the complainant, George G. Goodrich, and one-half thereof in said Frank Hansford Johnson.

And your orator further shows unto your Honors, that the said Thomas H. Williams, Jr., was lawfully married to one Beatrice Steele on or about the—day of June, 1901, and that there is issue of said marriage, one child, the said Thomas H. Williams (who is herein, throughout this bill designated as Thomas H. Williams 2nd, to distinguish him from his father, said Thomas H. Williams, Jr., and his grandfather, said Thomas H. Williams, deceased), born on or about February 14th, 1903, and who is an infant under the age of fourteen years, and who, under the will and decree of distribution hereafter fully set forth, claims to have an estate or interest in said real property in the State of California, or some part thereof.

And your orator further shows unto your Honors that said Jennie R. Williams is the surviving wife of said George E. Williams, deceased, and said George E. Williams is the only issue of said George E. Williams, deceased, and said Jennie R. Williams, and that they are the only heirs at law of the said George E. Williams, deceased, and, that under said will and decree of distribution hereafter fully set forth, they claim to have an estate or interest in the said real property situated in the State of California, or some part thereof.

And your orator further shows unto your Honors that the said Thomas H. Williams, deceased, prior to his de-

cease, made and signed two papers, purporting respectively, to be his last will and testament, and codicil thereto, and that a true copy of said will, marked "Exhibit A," and a true copy of said codicil, marked "Exhibit B," are annexed to this bill of complaint and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

And your orator further shows unto your Honors, that under the laws of the State of California, and especially under sections 715, 716, 771 and 749 of the Civil Code of California, the trust attempted to be created in and by the said will was at the time of its creation, ever since has been, and now is, void; that the absolute power of alienation of the property of said Thomas H. Williams, said testator, included in said attempted trust, was by said will, and by the terms of the trust thereby attempted to be created, suspended for the term of three years, and not for a period measured by the continuance of lives in being; and that, as to the property included in said attempted trust, the said Thomas H. Williams, died intestate, and that at his death the said property passed to, and vested in, his said heirs at law in the proportions before mentioned.

And your orator further shows unto your Honors, that in a proceeding in the Superior Court of the City and County of San Francisco, Probate Division, entitled "In the Matter of the Estate of Thomas H. Williams, Deceased," Numbered 5083, such proceedings were had that the said Court, by order, made and entered on the 6th day of April, 1886, admitted said will and codicil to probate, and directed that letters testamentary thereupon be granted unto said George E. Williams, the executor and trustee therein named, and that thereupon he qualified as such executor, and on the same day letters testamentary were issued unto him, and he took possession of the estate of said Thomas H. Williams, included in said void trust, as such executor, and as testamentary trustee under said will, and entered upon the execution of

said void trust, and carried on the business in which the said Thomas H. Williams was, at the time of his death, engaged, and continued so to do until the 5th day of January, 1897, when the said consent decree of distribution hereinafter fully set forth was made.

And your orator further shows unto your Honors, that the said Frank S. Johnson was, by an order of the Superior Court of Marin County, State of California, in a proceeding therein entitled "In the Matter of the Estate of Frank Hansford Johnson, a Minor," duly made and entered on the 11th day of March, 1889, appointed guardian of the estate of said infant, Frank Hansford Johnson; that on the same day said Frank S. Johnson qualified as such guardian, and letters of guardianship of the estate of said Frank S. Johnson were issued unto the said Frank S. Johnson; and that ever since then the said Frank S. Johnson has been, and now is, the guardian of the estate of said defendant, Frank Hansford Johnson, as by said order, duly filed and recorded in the office of the Clerk of said Marin County, reference thereunto being had, will more fully appear.

And your orator further shows unto your Honors, that on or about the 1st day of August, 1896, the said infant, Frank Hansford Johnson, applied by petition to said Superior Court of Marin County, in said proceeding, entitled "In the Matter of the Estate of Frank Hansford Johnson, a Minor" for leave to consent to a decree of distribution of said estate of said Thomas H. Williams, deceased, the terms and provisions of which had been previously agreed upon between said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, and said George E. Williams, testamentary trustee; and also for leave to consent to the appointment of appraisers to appraise said estate of said decedent pursuant to the terms and provisions of said void trust; that in said petition the facts of your orator's existence and of the marriage of your orator to Mary B. Johnson, the said divorced wife

of said Frank S. Johnson, and his interest in said estate of said decedent, were fraudulently concealed from said Court of Marin County, although the existence of your orator and his said marriage and his said interest in the estate of said decedent were well known to the petitioner, said Frank Hansford Johnson, and said Frank S. Johnson, his guardian, and to the other parties to said agreement, viz.: Thomas H. Williams, Jr., and said George E. Williams; and your orator further shows that the said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, did, with intent to deceive said Court, lead the Court to believe that the only persons interested in the said estate of said Thomas H. Williams, deceased, were the said infant, Frank Hansford Johnson, the said defendant, Thomas H. Williams, Jr., and the said testamentary trustee, George E. Williams; and further that at the time of making said application to said Court of Marin County for leave to consent as aforesaid, the said Frank Hansford Johnson, through his guardian, Frank S. Johnson, well knew that the said trust was void at its creation, and that the consent decree of distribution to which said minor asked leave to consent would work great injury, and defeat the rights of your orator to his share of the property embraced in said void trust; and that he, said Frank Hansford Johnson, through his said guardian, well knew that there were questions of law and fact which in good conscience should have been submitted to, and determined by, the said Court of Marin County, before the said minor should be permitted to consent that any distribution by consent decree, and before any other disposition of said trust property should be made; and your orator shows further that, before said petition to said Court of Marin County had been filed, an agreement had been made between said Thomas H. Williams, Jr., and said minor, through his guardian, said Frank S. Johnson, and consented to by said George E. Williams, that said questions of law and fact should be concealed and kept from said Court, and said consent de-

cree of distribution, as in the petition of said infant was fully described, should be granted upon consent, by the said Superior Court of San Francisco, Probate Division, in the said proceeding entitled "In the Matter of the Estate of Thomas H. Williams, deceased," so that they might wrongfully and fraudulently obtain all of said estate of said deceased to themselves, and thereby wrongfully and fraudulently deprive your orator of his legal share thereof. That thereupon, such proceedings were had in said proceeding entitled "In the Matter of the Guardianship of the Estate of Frank Hansford Johnson, a Minor," in said Superior Court of Marin County, that said Court, on the 1st day of August, 1896, made a decree permitting said minor through his said guardian to give such consent for said infant, as by reference to said petition filed, and said decree filed and of record in said last named matter in the office of the Clerk of Marin County, reference being thereunto had, will more fully appear. And your orator further shows that he had no notice or knowledge of said proceeding or decree in said Court of Marin County until November, 1903.

And your orator further shows unto your Honors, that on the 7th day of August, 1896, the said Thomas H. Williams, Jr., filed his petition in the Superior Court, Probate Division, of said City and County of San Francisco, in said "Matter of the Estate of Thomas H. Williams, deceased" asking for the appointment of appraisers of said estate pursuant to the terms of said void trust contained in said will, and particularly of subdivision fourth of Item Four thereof. That said petition was subscribed and sworn to by said Thomas H. Williams, Jr., on the 4th day of August, 1896. That in said petition the fact of the marriage of your orator to Mary B. Williams, the divorced wife of said Frank S. Johnson, was fraudulently concealed from the Court, and your Orator's name or existence was nowhere mentioned therein. That said sworn petition falsely and fraudulently, with intent to deceive said Court, represented to said Court that

George E. Williams, the executor and trustee acting under said will; said Frank Hansford Johnson, the minor; and said Thomas H. Williams, Jr., were the only persons, then living, interested in the distribution of the said estate, whereas the said petitioner, at the time of making said petition, well knew, and the said George E. Williams, Frank Hansford Johnson and Frank S. Johnson, and each of them, well knew of the marriage of your orator with Mary B., the divorced wife of said Frank S. Johnson, and well knew that your orator was one of her heirs as law, and was entitled as such (and your orator charges the fact so to be) to a distributive share of said estate, whether the said trust was void, or whether it was lawful and good. That such proceedings were had upon said petition, that the Court directed notice to said George E. Williams, Frank Hansford Johnson, a minor, and Frank S. Johnson, the guardian of said minor, and to no one else, to show cause at a certain time and place why the said petition should not be granted as prayed for, and that such notice was given them and to them only. That upon the hearing of said petition they were the only persons interested in said estate who had been served with notice thereof, or were parties to said proceeding; and that your orator had no notice or knowledge thereof, and that your orator never was a party thereto, or had a day in Court therein. That on said hearing, to wit: on the 12th day of August, 1896, the said George E. Williams as executor of said will, and as trustee thereunder, appeared in said Court in his own proper person, and Frank Hansford Johnson, the minor, and Frank S. Johnson, his guardian, also appeared in open Court, and by their attorneys, and they all consented in open Court to an order appointing appraisers, and that the said Court thereupon, upon said consents, made said order, under the provisions of said void trust, as by said petition for appointment of appraisers, and proceedings thereupon filed, in said matter entitled "In the Matter of the Estate of Thomas H. Wil-

liams, deceased" in the office of the Clerk of the City and County of San Francisco, August 7th, 1896, and said consent order appointing appraisers dated August 12th, 1896, and filed on December 11th, 1896, in said matter, in the said Clerk's office, reference being thereunto had, will more fully appear.

And your orator further shows unto your Honors, that the appraisers appointed by the consent order dated August 12th, 1896, aforesaid, did, pursuant to said order, appraise the property of said estate then in the hands of said George E. Williams as testamentary trustee under said void trust, at the sum of $1,465,800.08; whereof the value of the real estate which said Thomas H. Williams owned at the time of his death and which is fully described in the said decree of distribution, was $1,459,-445.08, and the value of the personal property therein was $6,355.00, as by the report of said appraisers filed in said matter in the office of said Clerk of the City and County of San Francisco, reference being thereunto had, will more fully appear. And your orator further shows that the said real estate is worth at this time at least the amount of said appraisement, and that the interest of your orator therein which forms the subject matter of this suit or controversy, is worth more than five thousand dollars.

And your orator further shows to your Honors, that on the 15th day of December, 1896, the defendant, Thomas H. Williams, Jr., filed in said Superior Court of the City and County of San Francisco, in the proceeding entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," his petition upon oath as beneficiary under said void trust, for final distribution, under the terms of said will, of the estate embraced in said void trust; and at the same time the said George E. Williams also presented and filed in said proceeding his final account, and report of his administration of said estate, as such executor, together with a petition upon oath for the settlement of said account and the final distribution of

said estate, in all of which your orator's existence and the fact of the marriage of your orator to Mary B. Johnson, the divorced wife of said Frank S. Johnson, and of the interest of your orator in said estate as aforesaid, was, by said Thomas H. Williams, Jr., and said George E. Williams, fraudulently and with intent to deceive said Court, concealed from said Court, although your orator's existence and said marriage and his said interest in said estate were well known to both petitioners and each of them; and your orator further shows that said petitioners, with like intent, did, in said petitions, wrongfully and fraudulently inform the Court that the only persons interested in said estate, or in the distribution thereof, were the petitioner said Thomas H. Williams, Jr., and said Frank Hansford Johnson, and the testamentary trustee, said George E. Williams; and, further, that at the time of making said petition the said Thomas H. Williams, Jr., and George E. Williams, and each of them, well knew that the said trust was void in its creation, and that the consent decree of distribution for which they were about to apply to said Probate Court would work great injury to and defeat the rights of your orator to his share of said trust property, and that they well knew that there were difficult questions of law and of fact which in good conscience should have been submitted to, and determined by the Court before any distribution by consent decree, or other disposition of said trust property, should be made. And your orator further shows that before said petitions were made or filed, the agreement aforementioned had been made between said Thomas H. Williams, Jr., and Frank Hansford Johnson, through his guardian Frank S. Johnson, that the property embraced in said void trust should be wrongfully and fraudulently distributed as in and by said consent decree of distribution done, which said agreement was known, and consented to by said George E. Williams, said trustee; and it was also agreed between them that said questions of law and fact should be con-

cealed and kept from said Court, and said consent decree of distribution should be made, so that they might wrongfully and fraudulently deprive your orator of his legal share thereof, as by said petitions and reports on file in said matter in the office of the Clerk of the City and County of San Francisco, reference being thereunto had, will more fully appear.

And your orator further shows unto your Honors, that in consequence of the concealments from, and false representations made to, the court as aforesaid; and in consequence of said consents as aforesaid, the said Superior Court of the City and County of San Francisco did, in said proceeding, entitled "In the Matter of the Estate of Thomas H. Williams, deceased," on or about the 5th day of January, 1897, render the consent decree of distribution aforesaid, which said decree was entered and recorded in said matter of said estate in the office of the Clerk of the City and County of San Francisco, on the 5th day of January, 1897, and that a true copy of said decree of distribution marked "Exhibit C" is annexed to this bill of complaint, and your orator prays that the same may be taken as a part of this bill as fully as if embodied herein.

And your orator further shows unto your Honors, that your orator was never made a party to the said proceeding in said probate court entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," in which the said will and codicil thereto were probated, or to any proceedings in the administration of said estate in said matter; that said proceedings have not been revived or continued as against him since the death of his said wife, as required by Sections 385 and 1713 of the Code of Civil Procedure of the State of California, or otherwise, and that he is not and never has been a party thereto and had no notice or knowledge thereof; and that he had no notice or knowledge of any of the proceedings therein mentioned for the distribution of said estate; or of the action or decree of the court thereon; and that in said proceed-

ings for said final decree of distribution, no day is, or was, or has been given to your orator, and that his first knowledge thereof, or of any thereof, was in November, 1903.

And your orator further shows unto your Honors, that before the hearing upon the petitions for final distribution aforesaid, said decree of distribution had been prepared by and agreed to by and between said minor, Frank Hansford Johnson, through his guardian, said Frank S. Johnson, and said George E. Williams, executor and testamentary trustee of said void trust, and said Thomas H. Williams, Jr., and had been and was consented to by each of them, and that by force of said decree the whole of said real estate of said Thomas H. Williams then remaining in the hands of said George E. Williams, executor and testamentary trustee of said void trust, was wrongfully and fraudulently divided and distributed as follows: 40 per cent thereof to said infant, Frank Hansford Johnson, in fee, 26 and 2-3 per cent thereof to said defendant, Thomas H. Williams, Jr., in fee, and 33 and 1-3 per cent thereof was decreed to remain in the hands of said George E. Williams, testamentary trustee under said void trust, for the benefit of said Thomas H. Williams, Jr., during his life, as provided in said will, and thereafter in accordance with said void trust.

And your orator further shows unto your Honors, that said decree was obtained by fraud, concealment from, and deception upon the court, and by the unlawful confederation, connivance, collusion and consent on the part of said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his guardian, said Frank S. Johnson, and said George E. Williams aforesaid; that the court had no jurisdiction to distribute said estate under the terms of said void trust, as the same was void in its creation; and that, as to the said trust property, the testator died intestate, as aforesaid, and it passed to and vested in his heirs at law at the time of his death and to

the heirs at law of said Percy, Sherrod, Bryant and Mary respectively, as they severally died, as before mentioned; that the concealment of your orator's existence and interest in the estate was a fraud upon the court. That the said consents were a fraud upon the court; that the said fraudulent concealment and fraudulent imposition upon and false representation to, the court, in obtaining said consent decree of distribution of the property embraced within said void trust, were by them used, made, done and perpetrated with the intent wrongfully to defeat your orator of his right as heir at law to the real estate of his said deceased wife.

And your orator further shows unto your Honors, that said defendants, Frank Hansford Johnson, through his guardian Frank S. Johnson, and Thomas H. Williams, Jr., pretended that said decree of distribution was fairly and properly obtained; and that said trust was valid under the laws of the state of California; and that a day was given, in said proceedings to obtain said decree of distribution, to your orator to show cause against the same; and that your orator is not entitled to attack the validity of said decree or the validity of said trust; or to obtain relief as against their fraudulent acts aforesaid; whereas your orator, the complainant, charges the contrary thereof to be true; and that said trust should be declared void; and that said consent decree of distribution, should be adjudged by this court to be nothing more than an agreement between said consenting parties thereto, namely, the said defendants, Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, testamentary trustee, for the fraudulent division among themselves of the share of the said real estate belonging to your orator; and your orator expressly charges that the said alleged trust is void, and was void at its creation, and that as to the property involved in said trust, said Thomas H. Williams died intestate, and that under the circumstances aforesaid, the said defendants Thomas H. Williams, Jr., Frank Hansford John-

son and John W. Ferris, as successor of George E. Williams, trustee, became and are, by reason of the wrongful and fraudulent acts aforesaid, and by reason of the invalidity of said void trust, the trustees for complainant, your orator, of the share of the real estate of said Thomas H. Williams, deceased, described in said consent decree of distribution, to which your orator was and is entitled as aforesaid.

And your orator further shows unto your Honors, that your orator, not being a party to, and having no notice or knowledge of, the said probate proceedings in which said decree of distribution was made, could not appeal therefrom, and that his only remedy to set aside said decree and obtain the relief herein prayed for, is by the interposition of a court of equity, and that under the laws of the State of California, the said probate division of the said Superior Court has and had no jurisdiction in that behalf.

And your orator further shows unto your Honors, that the said George E. Williams, trustee as aforesaid, departed this life on or about December 17th, 1899; and that thereafter an action was brought in the Superior Court of the City and County of San Francisco, State of California, wherein Thomas H. Williams, Jr., was plaintiff and Frank Hansford Johnson, a minor, Frank S. Johnson, guardian of the person and estate of said Frank Hansford Johnson, Frank S. Johnson, Jennie R. Williams, Executrix of the last will and testament of said George E. Williams, deceased, and Georgia E. Williams, were defendants, and that such proceedings were had in said action, that on the 21st day of May, 1900, a decree was made by said court appointing the defendant John W. Ferris trustee of said void trust, in the place and stead of said George E. Williams, deceased.

And your orator further shows unto your Honors, that your orator was never made a party to said last mentioned action, in which said John W. Ferris was appointed such trustee as aforesaid, and he is not and never

has been a party thereto, and had no knowledge of, or notice of, the bringing or prosecution of said action, or the proceedings therein or any of them, or of the action or decree of the court thereon; and further that said Thomas H. Williams, Jr., and said Frank Hansford Johnson and Frank S. Johnson, guardian as aforesaid, parties to said action, did, at the hearing thereof, fraudulently represent to said court in which said action was pending, that said Thomas H. Williams, Jr., said Frank Hansford Johnson and Jennie R. Williams, and Georgie E. Williams were the only persons interested in said estate of Thomas H. Williams, deceased, and they, said Thomas H. Williams, Jr., and Frank Hansford Johnson, and each of them, did fraudulently conceal from said court the existence of your orator and his marriage to Mary B. Johnson, and his interest in said estate, and that at said time and at all times during the pendency of said action, said Thomas H. Williams, Jr., Frank Hansford Johnson, through said Frank S. Johnson, guardian as aforesaid, parties to said action, well knew of your orator's existence; and well knew that your orator had the interest aforesaid in the said estate of Thomas H. Williams, deceased; and well knew of the marriage of said Mary B. Johnson with your orator; and well knew that the said trust was void at its creation as aforesaid. That in consequence of said false representations and fraudulent concealments, and upon the consent of the parties to said action, the said Superior Court made the decree aforesaid, appointing said John W. Ferris trustee of said void trust, in the place and stead of George E. Williams, deceased, as by said decree and proceedings in said action, on file and of record in said action in the office of the clerk of the City, and County of San Francisco, reference being thereunto had, will more fully appear. And your orator further shows that your orator had no notice of said last mentioned action or of the decree of the said court therein until November, 1903. That said John W. Ferris duly qualified as such trustee,

and gave the bond required by said decree, and took possession of, and still retains possession of, the 33 and ⅓ per cent. of the property distributed under said consent decree of distribution aforesaid, and which by the terms of said decree was left in the hands of said George E. Williams, as trustee, for the purpose of said void trust.

And your orator further shows unto your Honors, that under the laws of the State of California, and particularly under section 2224 of the Civil Code, the said Thomas H. Williams, Jr., and said minor, Frank Hansford Johnson and said John W. Ferris, testamentary trustee, (by reason of the fraudulent and wrongful acts and concealments of said Thomas H. Williams, Jr., and Frank Hansford Johnson as aforesaid and the invalidity of said void trust, as aforesaid) became and are trustees for your orator of the share of said real estate described in said decree of distribution belonging to your orator as aforesaid, and wrongfully and fraudulently gained by said Thomas H. Williams, Jr., Frank Hansford Johnson and George E. Williams, Trustee, and distributed among them by the fraudulent and consent decree of distribution under said void trust as aforesaid.

And your orator further shows that although the facts of the existence of your orator, that he was a citizen of New York State, and resided in the City of New York, were well known to the defendant Thomas H. Williams, Jr., Frank Hansford Johnson, through his said guardian, and said George E. Williams; and although your orator was entitled to reasonable and sufficient notice of the proceedings about to be taken by them, said defendants as aforesaid, for the distribution of said estate, they did, in order the more effectually to accomplish their said fraudulent purposes and design, and in order to obtain an apparent jurisdiction over your orator, obtain from said Superior Court of the City and County of San Francisco, upon the filing of their said petitions for distribution, orders purporting to fix —— the 26th day of De-

cember, 1896, for the hearing of said petitions and directing that notice thereof be given by posting the same in three public places in said City and County of San Francisco. That pursuant to said order, notices were posted in three places in said City and County, to wit, one at the public Morgue, one at the place where the said court was held, and one at the United States Court building; but said notices did not specify the true time fixed, as aforesaid, for such hearing, nor did either of them; that said posting was, by said order, directed to be made ten days before the said day fixed for the hearing of said petitions for distribution. That the said period of ten days was insufficient time for your orator, who resided in New York, to have by any possibility obtained knowledge of said notices and to have prepared for the hearing of said proceedings for distribution, and that said notices and the proceedings had in pursuance thereof were not and did not constitute due process of law within the meaning of Section 1 of Article XIV of the Constitution of the United States, and your orator never had his day in court in said proceedings for distribution, and the same as to him were and are void, and your orator therefore avers that by reason of the proceedings had and taken by the defendants, said Thomas H. Williams, Jr., said Frank Hansford Johnson, through his guardian said Frank S. Johnson, and the said George E. Williams, as aforesaid, in the matter of the distribution of said estate of said Thomas H. Williams, deceased, your orator has been deprived of his said interest in said real property of said decedent without due process of law, within the meaning of said Section 1 of said Article XIV of the Constitution of the United States.

And your orator further shows unto your Honors that immediately upon the making of said decree of distribution, "In the Matter of the estate of said Thomas H. Williams, deceased," the defendants, Thomas H. Williams, Jr., and Frank Hansford Johnson and the said George E. Williams, trustee as aforesaid, severally took

possession of the property set apart to them respectively by said decree of distribution, and the said defendants Thomas H. Williams, Jr., and Frank Hansford Johnson have ever since then retained, and do yet hold possession of the property set apart to them respectively as aforesaid by said decree of distribution; and have received and collected the rents, issues and profits thereof, all of which they have appropriated to their own use; that such rents, issues and profits aggregate a large amount of money, the precise amount of which your orator, having had no means of ascertaining the same, is unable to state and seeks discovery thereof, that the said George E. Williams, trustee, continued to hold and retain until his death, as aforesaid, the possession of the 33 and ⅓ per cent. of said estate awarded to him by said decree of distribution, and after his death the same passed into the possession of the defendant John W. Ferris, trustee, as aforesaid, as the successor to the said George E. Williams as such trustee, and the defendant John W. Ferris, trustee, still retains and holds the same and during all that time has received the rents, issues and profits thereof, of the times and amount of which your orator seeks discovery; that by reason of the taking and retention by the defendant, Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, trustee as aforesaid, and after his death, by the defendant John W. Ferris, acting as his successor, of that portion of the said property to which your orator is entitled, as aforesaid, under the fraudulent acts and circumstances as aforesaid, and by reason of the invalidity of said Trust as aforesaid, the defendant Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams became, and they the said defendants and said defendant John W. Ferris, trustee, are now the trustees for your orator of the property, as aforesaid, to which your orator, is entitled, as herein alleged, under the general principles of equity jurisprudence, and also under the provisions of the statutes of the State of California

commonly known as the Civil Code of said State, and Sections 2223 and 2224 thereof,

And your orator further shows unto your Honors, that in and by the provisions of the Statute of the State of California, commonly known and called the Code of Civil Procedure of said State, and by section 1633 thereof, it is provided as follows:

"When any account is rendered for settlement, the "clerk of the court must appoint a day for the settlement "thereof, and thereupon give notice thereof by causing "notices to be posted in at least three public places in "the county, setting forth the name of the estate, the ex- "ecutor or administrator, and the day appointed for the "settlement of the account. If, upon the final hearing "at the time of the settlement, the court, or a judge "thereof, should deem the notice insufficient from any "cause, he may order such further notice to be given as "may seem to him proper."

That by section 1634 of said Code, it is provided as follows:

"When settlement is final, notice must so state. If the "account mentioned in the preceding section be for a "final settlement, and a petition for the final distribution "of the estate be filed with said account, the notice of "settlement must state those facts, which notice must be "given by posting or publication for at least ten days "prior to the day of settlement. On the settlement of "said account, distribution and partition of the estate "to all entitled thereto may be immediately had without "further notice or proceedings."

That the account alleged to have been filed in the said Superior Court of the City and County of San Francisco Probate Division in the proceedings entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," on the 15th day of December, 1896, was an account filed for a final settlement of said estate; and the petitions for

distribution of said estate filed by said George E. Williams, Executor, and the defendant Thomas H. Williams, Jr., were filed by them and each of them for a final distribution of said estate, and the report hereinbefore referred to as having been filed by said executor on said 15th day of December, 1896, was filed as and for his final report of his administration of said estate; that under and by the provisions of said sections of said Statute as hereinbefore recited, it is provided that the notice to be given of the hearing to be had on such settlement of said final account and of such petitions for final distribution must be given by posting or publication for at least ten days prior to the day of settlement.

Your orator further shows that the said Statute further provides that upon the final hearing at the time appointed for such settlement, the court or the judge thereof, if he deem the notice given to be insufficient from any cause, may order such further notice to be given as may seem to him proper and as provided in and by the terms of said section 1633;

That pursuant to the section last above mentioned of said Code of Civil Procedure of said State, the said Superior Court of the City and County of San Francisco, in said proceeding made an order directing that notice of the settlement of said final account and of the hearing of said petitions for distribution be given by the posting of notices in three public places in said City and County of San Francisco, and that such posting should be made ten days before the date fixed as aforesaid, for the settlement of said final account and the hearing of said petitions for final distribution. That the time as fixed by said order of court was the minimum time allowed by the provisions of said Code of Civil Procedure, to wit: ten days. That by reason of the fraudulent concealment of the existence of your orator; and of the fact that he resided in, and was a citizen of, the State of New York; and of the fact that he was entitled to a distributive share of the estate of said Thomas H. Williams,

deceased, whether the said trust were void or valid; and also by reason of the false and fraudulent representations to said court made as aforesaid by defendants Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, the said court was imposed upon, and led to believe, and did believe, that there were no persons interested in said estate other than the said Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, and by such inducements the minimum time was fixed, as aforesaid, by said court for the giving of such notice, when in fact and in truth the time as thus fixed was not a reasonable time of notice, and did not, and could not, give to your orator any notice of the said proceedings, or any of them, and did not, and could not, afford him any opportunity to appear in said matter or to be heard therein; that upon the final hearing, at the time of such settlement, the defendants, Thomas H. Williams and Frank Hansford Johnson, through said guardian, and said George E. Williams, continued such concealment and said fraudulent misrepresentations to said court, otherwise said court would have deemed the said notices insufficient, and would have ordered further and other notice to be given to your orator.

And your orator further shows unto your Honors, that he has not been in the State of California at any time since the death of his wife, as aforesaid, except for a few days immediately after her death, when he brought her remains to San Francisco for interment. While in San Francisco the said George E. Williams declared to your orator that his wife had no interest in the estate of her deceased father, or property of any kind or character whatever, and that she left no estate; and your orator thereupon returned to his residence in the State of New York. That at the time of the death of your orator's said wife she was indebted to a firm of jewelers in the City of New York to the amount of several thousand dollars, and the creditor demanded payment of said in-

debtedness from your orator. That when in San Francisco your orator informed said George E. Williams of these facts and inquired of him whether the said wife of your orator had left any property or estate available for the payment of said demand, and the said George E. Williams assured your orator, and represented, stated and declared to him, that she had left no property or estate whatever, and your orator believed and relied upon the representations, declarations and statements of said George E. Williams, as aforesaid, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife; and being so induced, he did thereafter abstain from any such inquiry, and he knew nothing at all of the fact that he was entitled to any property as heir-at-law of his deceased wife, or under said will of Thomas H. Williams, deceased, until the month of November, 1903, when, in the City of New York, his attention was first called to said matter by a stranger, who while in California pursuing an investigation not at your orator's instance, and not concerning him or his interest, had himself discovered the fact that your orator was entitled as aforesaid, whereupon your orator took steps at once to ascertain the facts connected with his interest in said property as hereinbefore stated, and retained counsel to prosecute the necessary inquiries relating thereto, and also to enforce such rights as your orator may have in the premises.

2. Between lines 22 and 23 of page 27, add to said bill of complaint the following, viz:

"That in the said petition of said George E. Williams for the distribution of said estate of said Thomas H. Williams deceased, the said George E. Williams stated, among other things, as follows, to wit:

"That numerous controversies have heretofore existed between Thomas H. Williams, Jr., hereinbefore named, and Frank S. Johnson, the guardian of Frank Hansford Johnson, a minor, and that no other persons

are interested in the distribution of the estate belonging to the deceased testator, except your petitioner, said Frank H. Johnson, and Thomas H. Williams, Jr. * * *

"That the said Frank S. Johnson, guardian as aforesaid, and the said Thomas H. Williams, Jr., have agreed upon an amicable settlement of all disputes between them, and the said Frank S. Johnson has due and legal authority to enter into and to consent to such settlement in the distribution of the estate of Thomas H. Williams, deceased."

That in said petition of Frank S. Johnson, as guardian of the estate of said Frank Hansford Johnson, the said Frank S. Johnson stated among other things as follows: "That all of the children of the said Thomas H. Williams, named in said will, excepting Thomas H. and Mary, have died without issue, and that Mary, the daughter of said Thomas H. Williams, mentioned in said will, has died leaving one child, the said minor, who is the sole issue of said Mary and your petitioner, who were husband and wife."

That complainant is informed and believes and upon such information and belief alleges that the said allegation was made for the purpose of inducing the court to which said petition was presented to believe and by the same the said court was induced to believe that the said petitioner, said respondent Frank S. Johnson was the husband of said Mary Williams at the time of her death. That in said petition of said Frank S. Johnson in behalf of his ward, said Frank H. Johnson, the said petitioner stated also the following: "That many questions have arisen, followed by controversies between your petitioner, representing said minor, and Thomas H. Williams, Jr., the surviving son and only child living of said Thomas H. Williams, deceased, and who is over the age of 21 years, in relation to the distributive share of said minor of the properties of said estate. That the settlement of such questions and controversies through the courts involves the determination of many intricate, dif-

ficult and unsettled questions of testamentary construction, and of facts, and will require the expenditure of large sums of money and great delay in the settlement of said estate. That, as your petitioner is informed and believes, it is for the best interests of the estate of said minor to make an equitable settlement and adjustment of all difference between said minor and the said Thomas H. Williams, Jr., relating to the distribution of said estate, and accordingly your petitioner under the advice of counsel and subject to the approval of this court, has on behalf of said minor agreed with Thomas H. Williams, Jr., to settle all matters of doubtful construction of said will and all questions and matters of difference between them in relation to said estate and the properties thereof * * * ."

That in said petition of said Thomas H. Williams, Jr., for the distribution of the estate of said Thomas H. Williams, deceased, the said Thomas H. Williams, Jr., stated among other things the following: "That prior to the filing of this petition, your petitioner and said Frank Hansford Johnson, acting by and through his guardian, as aforesaid, Frank S. Johnson, and the said George E. Williams, have fairly, thoroughly and in detail agreed upon what property shall be set apart and distributed to George E. Williams for the benefit of your petitioner during his life, as provided in said will, and what part and portion of said property shall be distributed to said Frank Hansford Johnson in fee and what property shall be distributed to your petitioner in fee under the terms of said will. That your petitioner and said Frank H. Johnson and said George E. Williams are the only persons interested in said estate."

That said Thomas H. Williams, Jr., also stated in his said petition the following: "Your petitioner further represents that prior to the appointment of appraisers herein as hereinbefore recited on the 12th day of August, 1896, a controversy had arisen between your petitioner and Frank S. Johnson, the said guardian of said Frank

Hansford Johnson, in regard to the method in which the property of the estate of said deceased testator should be distributed. That a settlement of said controversy through the courts involved the determination of many intricate, difficult and unsettled matters of testamentary construction and of fact, and would require the expenditure of large sums of money and great delay in the settlement of said estate, and that the said parties in interest have, subject to the approval of this court, amicably and equitably settled and adjusted all difficulties between them, and that said Frank S. Johnson, as the guardian of said minor, has obtained from the Superior Court of Marin County, State of California, having jurisdiction of the estate of said Frank Hansford Johnson, a minor, due and legal authority to enter into and to consent to such settlement and to the distribution of said estate of Thomas H. Williams, deceased, hereinbefore prayed for * * * That in order to carry such settlement into effect your petitioner has yielded to said Frank Hansford Johnson such a proportion of said estate claimed by your petitioner in fee as would insure to said Frank Hansford Johnson and to said George E. Williams, trustee, any and all amounts which might be claimed by them respectively under any construction of said will or under any settlement of the disputed questions of fact."

That the said allegations of respondents Frank S. Johnson and Thomas H. Williams, Jr., and Geo. E. Williams in their said petitions were made for the purpose and with the intent of inducing the said probate court to withhold its consideration and determination of said questions of law, and in order to prevent the submission of the same to the said probate court and to avoid a consideration of same by said court.

That relying upon the said allegations contained in said petitions that the said minor and said Thomas H. Williams, Jr., were the only persons interested in the distribution of the estate of said Thomas H. Williams, deceased, and that they had made an agreement respect-

ing the distribution of the property of said estate, which they desired the court to carry into effect by a consent decree, the said probate court was induced to believe and did believe that said minor and said Thomas H. Williams, Jr., were the only persons interested in the said estate and the only persons concerned in the distribution thereof, and that their agreement was operative to settle and adjust their respective rights and differences and to distribute said estate lawfully, and the court did thereupon, pursuant to said petitions and in accordance with said agreement, make the said consent decree of distribution, but in so doing the said court being imposed upon by said allegations in said petitions and relying thereon, as aforesaid, and believing that the said Thomas H. Williams, Jr., and said Frank Hansford Johnson were the only persons interested in said estate, and that their agreement made as aforesaid operated to settle and adjust their respective rights and differences, and to distribute said estate among all the persons interested in said estate, did not consider any of said questions of law or fact, and the same were never presented to said court, and they were never adjudicated upon, and none of them was ever adjudicated or determined.

That among the questions of law referred to in the allegations of said petitions, concerning which questions controversies had arisen between the said parties, was the question of the true construction of said will of said Thomas H. Williams, deceased; and that all said parties knew that the trust attempted to be created by said will was void for the reasons hereinbefore stated and that, as to the real property comprising the estate of said Thomas H. Williams, deceased, he had died intestate; and that if said questions were submitted to said probate court, the determination thereof could not be otherwise than that the said trust was void and that said decedent had died intestate, and that the complainant was entitled to a distributive share of said estate.

That the said allegations of said petition of respon-

dent Frank S. Johnson, guardian, were made with intent to deceive said court of Marin County into the belief that no person was interested in said matter than said minor and his guardian and by reason thereof to withhold notice to complainant of such petition and said agreement; and said court, being by said petition and the representations therein made, as aforesaid, that no person other than said minor and his guardian was interested in said matter omitted to give any notice of the hearing of said petition of said guardian, but granted same *ex parte* upon the faith of said petition and a written con-suit, purporting to be by all persons interested, signed by respondents Frank S. Johnson, Thomas H. Williams, Jr., and said George E. Williams.

That by reason of the said petitions of said George E. Williams, Jr., and the said petition of respondent Frank Hansford Johnson by his said guardian, they made it appear to said probate court, that all persons interested in the estate of said Thos. H. Williams, deceased, had consented to an agreement providing for the distribution of and effectual to distribute finally said estate and that, because of such consent and agreement of all persons interested in said estate, it would not be necessary for the said court to consider or determine any of the questions of law and fact which it was stated in said petitions had arisen among respondents, (including the question of the construction of said will of said Thos. H. Williams, deceased, and the validity of the trust created thereby;) and, therefore, upon the hearing of said petitions for distribution, the said court did so believe, and by reason of such belief, it was induced to and did forbear and refrain from all inquiry into and consideration of such questions of law and fact, and upon such hearing no testimony was taken, none of such questions was discussed, no evidence was submitted thereon, except said petitions themselves and said agreement, no argument was had upon any of said questions, none of them was contested, and the merits of the controversies that had arisen upon

such questions, as stated in said petitions, were not inquired into or considered at all, but, upon the representations made in said petitions, as aforesaid, and the same representations which were again made by said respondents Johnson and Thos. H. Williams, Jr., and said George E. Williams at the hearing of said petitions that all such matters and things had been settled by agreement, the said probate court, upon their application, made said decree, but only as a consent decree to record and carry into effect the said agreement of said Geo. E. Williams and respondents Johnson and Thos. H. Williams, Jr., and not otherwise.

That by reason of the representations and declarations of said Geo. E. Williams, made in 1893 to complainant, as hereinbefore alleged, he was induced to believe, and he did believe, until November, 1903, that his wife, said Mary Williams Goodrich, had left no property or estate whatever, and that her interest in the estate of her father, said Thos. H. Williams, deceased, ceased with her death.

That said Geo. E. Williams was by profession an attorney-at-law of many years' practice and of great experience, and for a number of years he was a judge of the Superior Court of the State of California. Complainant is not a lawyer, never was, and knew nothing of the laws of California. Complainant knew nothing about the will of Thos. H. Williams, deceased, was not familiar with its terms, and was not aware of the nature or extent of the provisions it made for his wife. All he knew was that his wife during their married life was receiving money from her father's estate in California. How much she was thus receiving and had received complainant did not know, and during all their married life, they lived in New York City, where complainant has resided for twenty years last past. That the lands described in said decree of distribution are not a fluctuating value. They are worth now no more than they were when respondents acquired possession and control of

them, as herein alleged. No improvements of great value or consequence have been made upon them, and respondents are now in possession of them, as herein alleged, and the rents, issues and profits of such lands since respondents obtained them, as aforesaid, have largely exceeded in value and amount any moneys expended by respondents for taxes, insurance, repairs or betterments or improvements of any kinds.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

1. Whether the said Thomas H. Williams died at the time and place mentioned, or if not, at what time and place did he die?

2. Whether Sherrod Williams, Percy Williams, Bryant Williams and Mary B. Goodrich died in the order above named, or in what order did they die?

3. Did Sherrod Williams, Percy Williams, Bryant Williams and Mary B. Goodrich respectively die at or about the time above stated, or at what time did they respectively die?

4. Whether upon their respective deaths they severally left the heirs at law as above stated, or what other or different heirs at law did they respectively have at their respective deaths?

5. Whether said Thomas H. Williams left no wife as above stated?

6. Whether the only heirs at law of said Thomas H. Williams, at his death, were Sherrod Williams, Thomas

H. Williams, Jr., Mary B. Goodrich, Percy Williams and Bryant Williams, as above stated, or what other and different heirs at law did he leave at his death?

7. Whether at the time of the death of said Thomas H. Williams the mother of said children and heirs at law was dead?

8. Whether said Percy Williams married and had issue as above stated, or to whom and when and where was he married, and what issue was born of said marriage?

9. Whether the issue of said Percy's marriage died as above stated, or when and where did such issue die?

10. Whether said Sherrod Williams left no wife or lawful issue as above stated?

11. Whether said Bryant Williams died unmarried and without lawful issue, as above stated?

12. Whether said Mary B. Williams was married to said Frank S. Johnson as above stated, and when and where was she married to him, and whether she had as issue of said marriage defendant Frank Hansford Johnson, as above stated?

13. Whether said issue is of the age above stated or of what age is he?

14. Whether the said George E. Williams, after taking possession of said estate, administered it in accordance with the provisions of said will and codicil, and did continue the business of the said Thomas H. Williams as above stated, or in what other or different way did he manage the said property?

15. For how long did he continue to administer the property of the estate of said Thomas H. Williams, deceased, under the provisions of said will, or how otherwise did he manage or administer said estate, and for how long?

16. Whether said Thomas H. Williams, Jr., pretended that George G. Goodrich, the complainant, was given a day in court in said probate proceedings, in the said Superior Court of the City and County of San Francisco, Probate Division in the proceeding entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," to show cause against the said decree of distribution or any other proceedings therein, and state particularly in what manner, and how, it is pretended or claimed by said Thomas H. Williams, Jr., that the complainant was given a day in court in said proceedings in said matter, to show cause against the said decree, or against any, and which, of the said proceedings in said matter?

17. Whether said Frank Hansford Johnson, through his said guardian Frank S. Johnson, pretended that George G. Goodrich, the complainant, was given a day in court in said probate proceedings, in the said Superior Court of the City and County of San Francisco, Probate Division, in the proceedings entitled, "In the Matter of the Estate of Thomas H. Williams, deceased," to show cause against the said decree of distribution or any other proceedings therein, and state particularly in what manner, or how, it is pretended or claimed by said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, that the complainant was given a day in court in said proceedings, in said matter, to show cause against the said decree, or against any and which of the said proceedings in said matter?

18. Whether the said Thomas H. Williams, Jr., refuses to account to the complainant, as his trustee, for the share of the property described in said decree of distribution, and for the rents and profits thereof, in his hands, to which complainant is entitled as above stated?

19. Whether the said Frank Hansford Johnson through his said guardian, Frank S. Johnson, refuses to account to the complainant, as his trustee, for the share of the property described in said decree of distribution,

and for the rents and profits thereof, in his hands, to which complainant is entitled as above stated?

20. Whether the said John W. Ferris, upon his appointment and qualification as trustee as the successor of George E. Williams, as above stated, took possession of the property described in said decree of distribution and set apart thereby to George E. Williams as such trustee, and whether he still has such possession thereof, and what, if any, disposition has he made of the same, or any and which part thereof; and what, if any, incumbrance has he placed, or permitted to be placed, thereon, or any and what part thereof; and what if any, rents and profits thereof have come into his hands, since the said property came into his possession; and whether any part thereof has been sold or exchanged for other property; and if any part thereof has been sold in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of; and how was any property purchased with such proceeds disposed of; and by what authority said alienations or incumbrances, or re-investments and each of them were done, made or suffered?

21. Whether the said Thomas H. Williams, Jr., took possession of the property described in said decree of distribution as set apart to him in fee, and whether he still has possession of the same; and what, if any, disposition has he made of the same, or any, or which, part thereof; and what, if any, incumbrance has he placed or permitted to be placed thereon; or on any, and which part thereof; and the extent and nature of such incumbrance or incumbrances; and what, if any, rents and profits thereof have come into his hands since the same came into his possession; and whether any part of said property has been sold or exchanged for other property; and if any part thereof had been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of; and how, if at all, was any property purchased with such proceeds disposed of; and

by what authority said alienations or incumbrances, or re-investments, and each of them, were done, made or suffered?

22. Whether the said Frank Hansford Johnson, through his said guardian, Frank S. Johnson, took possession of the property described in said decree of distribution as set apart to him in fee; and whether he still has such possession; and what, if any, disposition has he made of the same or any and which part thereof; and what, if any, incumbrance has he placed or permitted to be placed thereon, or on any, and which part thereof; and the extent and nature of such incumbrance, and what, if any, rents and profits thereof have come into his hands since the same came into his possession, and whether any part thereof has been sold or exchanged for other property; and if any part thereof has been sold, in what manner were the proceeds, and the rents, issues and profits of said proceeds disposed of; and how, if at all, was any property purchased with such proceeds disposed of; and by what authority said alienation or incumbrances, or re-investments and each of them, were done, made or suffered?

And that the said decree of distribution may, for the reasons aforesaid, be decreed by this Honorable Court to be fraudulent, and of no force and effect as against your orator.

And that this Honorable Court will decree that the trust attempted to be created by said will of said Thomas H. Williams, deceased, was void at its creation, and that as to the said real estate embraced in said void trust the said Thomas H. Williams, died intestate, and that at his death the said real estate passed to, and vested in, his said heirs at law; and that your orator on the death of his wife, became entitled to seven thirty-seconds of said real estate then in the hands of George E. Williams, Executor and trustee under the will of Thomas H. Williams, deceased.

And that the defendants Thomas H. Williams, Jr., Frank Hansford Johnson, Frank S. Johnson, and John W. Ferris will severally make discovery of the property to which the complainant is entitled and which has come into their hands under said decree of distribution, and of the proceeds of the sale of any thereof and of the rents, issues and profits thereof by them severally or jointly received:

And that this Honorable Court will decree that said defendants, Thomas H. Williams, Jr., Frank Hansford Johnson, and John W. Ferris, are trustees for your orator of that part of the real estate of said Thomas H. Williams, deceased, to which your orator is entitled as heir at law of his deceased wife, said Mary Bryant Goodrich, and which came into their possession, as aforesaid under said decree of distribution and the rents and profits thereof received by them, said Thomas H. Williams, Jr., Frank Hansford Johnson and John W. Ferris, and that said real estate, and the proceeds thereof, if sold by them, is charged in their hands with a trust in favor of your orator to that extent.

And that a receiver may be appointed according to the course and practice of this Court, with the usual powers of receivers in like cases, of the said property to take and hold the same and to collect the rents and profits thereof during the pendency of this suit, and upon the final decree herein to make such disposition of such property as in and by said decree directed and to obey each and every other order or decree herein.

And that an accounting be had under the direction of this Honorable Court of the real estate which came into the hands of defendants, Thomas H. Williams, Jr., Frank Hansford Johnson and George E. Williams, Trustee, and his successor, the defendant John W. Ferris, under said decree of distribution, and the rents and profits thereof; that upon said accounting it be ascertained to what portion of said real estate, and of the rents and profits thereof, your orator is entitled from said defen-

dants, and each of them; that as to the portion to which your orator is entitled, they and each of them, may, by decree and order of this Honorable Court, be ordered severally to convey and transfer to your orator such part so found due from each of them, or the value thereof, to be ascertained by this Honorable Court, and that they and each of them be enjoined and restrained during the pendency of this action and perpetually thereafter from conveying, alienating or incumbering the said real estate, or its proceeds if sold, until the share and proportion of said real estate and the rents and profits thereof to which your orator is entitled, and which the Court shall find said John W. Ferris, Frank Hansford Johnson and Thomas H. Williams, Jr., either severally or collectively, wrongfully in possession of, or the value thereof, be conveyed and transferred to your orator, and until the said defendants John W. Ferris, Thomas H. Williams, Jr., and Frank Hansford Johnson, and each of them, shall be discharged and released from the trust in your orator's favor which has become a charge against said real estate of its proceeds, in their and each of their hands, to the extent of the interest of your orator therein, and your orator prays for such other and further relief as the nature of this case may require and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpœna to be directed to the said John W. Ferris, of San Francisco, a citizen of the State of California, Frank Hansford Johnson, an infant, of the age of 18 years, whose estate is under the custody and control of Frank S. Johnson; and Frank S. Johnson, as guardian of the estate of said Frank Hansford Johnson, both of the City of San Rafael, State of California; Thomas H. Williams, Jr., of San Francisco, a citizen of the State of California, Georgie E. Williams of San Francisco, Cal., and Jennie R. Williams of San Francisco, Cal., heirs at law of George E. Williams, deceased, citizens of California; and Thomas H. Williams, an in-

fant, who resides with its father, Thomas H. Williams, Jr., at San Francisco, thereby commanding them and each of them at a certain time, and under a certain penalty therein to be limited, personally to appear before your honors, in this Honorable Court, and then and there full, true and correct and perfect answer make, under oath, to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree therein as to your Honors shall seem agreeable to equity and good conscience.

GEORGE G. GOODRICH,
Complainant.

JOHNSON & JOHNSON,
Complainant's Solicitors.

JAMES A. LOUTTIT,
HENRY ARDEN,
MONROE & CORNWALL,
Of Counsel.

APPENDIX "B."

CURTIS v. SCHELL et al.

(S. F. 2,027.)

(Supreme Court of California. July 18, 1900.)

(129 Cal. 208.)

Executors and Administrators—Allowance for Support—Probate Decree—Fraud—Equity.

1. By the terms of the will the estate was not to be divided until the youngest son, then 2 years old, should become 21. In the meantime the income of the real estate was to be paid to the widow, for the support of herself and children. The income not being sufficient, the widow, who was executrix, borrowed money, which was used to support the family, and secured the loans by mortgages on her interest in the real estate of such estate. After the majority of the youngest son an allowance for the family support was made for all the years of administration, and the real estate ordered sold to pay it. The interest of the widow in the estate, after payment of such allowance, was insufficient to pay the mortgages. *Held*, that the proceeds of the real estate should be applied to the payment of the mortgages before the payment of the family allowance; the money loaned being used in lieu of a family allowance, and not loaned to an heir, merely, but to the sole executrix of the estate.

2. The judgment of the probate court granting the allowance, without the knowledge of the mortgages for the money used for that purpose during administration, was not conclusive, but equity would relieve against the fraud, without specifically finding fraud or setting aside the order of the probate court, by taking charge of the proceeds of the sale, and directing their application among those entitled.

In bank. Appeal from superior court, city and county of San Francisco.

Suit by May B. Curtis against Georgiana L. Schell, executrix of the will of Theodore L. Schell, deceased, and others, to set aside an order granting a family allowance in the settlement of the estate of Theodore L. Schell, deceased, and to set aside an order authorizing the sale of the real property of the estate for the purpose of paying such allowance. From a judgment in favor of plaintiff, and from an order denying a motion to set aside such judgment, defendants appeal. Affirmed.

Fisher Ames, for appellants. Gordon & Young for respondent.

Van Dyke, J. This is a proceeding in equity to set aside an order granting a family allowance in the matter of the estate of Theodore L. Schell, deceased, and an order authorizing the sale of the real property of said estate for the purpose of paying said family allowance, and for general relief. From the facts found, the court, as a conclusion of law, held that the mortgages given to secure the indebtedness held by the plaintiff were a lien upon the interest of the defendant Georgiana L. Schell in and to the real estate of the estate of said Theodore L. Schell, and that said interest of defendant Georgiana L. Schell, as an heir at law, legatee, and devisee of said Theodore L. Schell, in the proceeds of the sale of said real estate, should be applied to the payment and satisfaction of said borrowed money so secured by said mortgages, before the payment of the said family allowance, and a decree was entered accordingly. This appeal is taken from the judgment and decree so entered, and from an order made and entered, denying the motion of the defendants to set aside and vacate said judgment, and is based upon questions of law alone.

It is contended on the part of the appellants that the conclusions of law are not justified by the facts found; that there is no finding of fraud in procuring the order for a family allowance, or the order of sale to pay the same; that, failing to find fraud or to set aside the orders of the probate court, the jurisdiction of a court of equity was at an end, and the court, therefore, could not

control or direct the application of the proceeds of the sale.

A history of the case may be necessary to a proper understanding of the questions involved: Theodore L. Schell died at the city and county of San Francisco December, 1877, leaving a will by which the defendant Georgiana L. Schell and one William Hale were appointed executors. In June, 1886, Hale resigned as executor, and since that date the defendant Georgiana L. Schell has continued to administer the estate solely as the executrix of the said last will. By the terms of the will one-third of the estate was devised to said defendant Georgiana L. Schell, the widow of the said decedent, and the remaining two-thirds to his six children, the youngest of whom, a son, was, at the time of his death, 2 years old. It was provided in the will that the estate should remain intact and undistributed until the youngest son should attain the age of 21, and in the meantime the income of the real estate should be paid to said widow for the support and maintenance of herself and children. The youngest son became of age December, 1896. The income from the estate, after the expenses of managing the same, not being sufficient to support the family, the widow from time to time borrowed money for such purpose, mingling the said moneys so borrowed with the moneys received by her as income from the said estate, and using the same for the family support. To secure the money so borrowed, she executed mortgages to the parties loaning the same of all her right, title, interest, and estate as an heir at law, devisee, and legatee in and to the real estate of said estate. The first of the mortgages so executed was to the Bank of Sonoma County, in April, 1883, and was given to secure the sum of $5,600 with interest. The second was executed November, 1887, to Lewis F. Curtis, to secure the payment of the sum of $3,000, with interest. These two mortgages covered lands belonging to said estate in Sonoma county. In November, 1887, she executed two other mortgages to said Lewis F. Curtis,—one to secure the sum of $2,800,

and the other the sum of $1,200, with interest on each at the rate of 8 per cent. per annum, on certain real estate belonging to said estate, in the city and county of San Francisco. The mortgage held by the Bank of Sonoma County was foreclosed, and the interest covered by the same sold thereunder, which interest has become vested in the plaintiff. The other mortgages, by proper assignment and transfer, have also become vested in the plaintiff. Two of the children having died, their interest under the will became vested in their mother, the defendant Georgiana L. Schell. On December 14, 1896, on the petition of the said Georgiana L. Schell, the probate court of the city and county of San Francisco, in which the estate was being administered, granted an order for family allowance in the sum of $150 a month, running back to the 1st of January, 1880; aggregating, as stated in the findings, the sum of about $30,000. Thereafter, on the 23d of April, 1897, said probate court made and entered an order to sell the real estate of said decedent to pay said family allowance and expenses of administration; and it is found that said order was based upon the claim made by said executrix that there was then due the sum of $36,000 for expenses of administration and for said family allowance, and there was no personal property remaining in the hands of the said executrix wherewith to pay the same. The value of the whole of the property of the said estate in December of that year was appraised at $44,396. As above shown, the decedent directed by his will that all the income of the estate should belong to the widow, for the purpose, among other things, of providing family support; but said income, it appears, did not afford sufficient means for the support of the family, and hence the widow, instead of obtaining an order of court for the sale of the property of the estate to provide for family support, borrowed money from time to time, and used such money, as found by the court, for the purpose of supporting the family. This state of things continued about 19 years, and until after the

youngest of the children had attained majority. The mortgages to secure the money borrowed, as already appears, were executed by Georgiana L. Schell on her interest as devisee, legatee, and heir at law of Theodore L. Schell, deceased.

The rule of law is, as claimed by the appellants, that one to whom the title or interest of an heir at law is transferred pending administration takes only so much of the distributive share belonging to said heir as remains after the purposes and objects of administration have been satisfied. It is therefore claimed that the mortgagee who loaned money in this case did so, presumably, knowing the law. Although a party is presumed to know the law, he is not presumed to anticipate any unusual or extraordinary proceeding taken under the form or guise of law. Family allowance in the administration of an estate is generally for a temporary purpose, and the settlement of an estate and the distribution of the same to the parties entitled thereto generally take place within a reasonable period. Certainly no one would be bound to take notice that an application for a family allowance would be made, as in this case, after all the children had ceased to be a charge upon the widow, and after the estate was ready for distribution under the terms of the will, and in view of the fact that the money loaned was for the purpose of supporting the family, and presumably in view of avoiding the necessity of selling the estate to provide a family allowance. The application for family allowance was therefore not in the ordinary course of procedure. Upon the hearing of the petition for family allowance, although it was stated that the petitioner had borrowed money from divers persons for the support and maintenance of herself and family, it was not stated that these sums had not been paid; and it is found. "The court was not informed, and at the time of making said order for said family allowance had no notice or knowledge, that the said defendant Georgiana L. Schell had made and executed the mortgages men-

tioned." This was the suppression of a very material fact, which ought to have been brought to the knowledge of the court. The amount of debts, exclusive of these mortgages, and including the family allowance, as shown by the finding, was some $36,000; and the value of the whole property, as also found, was $44,396. Deducting the expenses, including the family allowance, from the whole value of the property, would leave only a little over $8,000. The widow held a five-ninths interest in this, which would be less than $5,000. The amount secured by mortgages which were a subsisting lien upon the interest of the petitioner, with accumulated interest, aggregated from $20,000 to $25,000. Therefore, if the scheme inaugurated on behalf of the petitioner should be carried out by a sale of the entire property for the payment of the said family allowance and the expenses of administration, there would be less than $5,000 remaining of the interest belonging to her with which to discharge the indebtedness due the plaintiff, leaving nearly $20,000 unpaid. The case here is different from that of simply buying the interest of an heir, in which, of course, the purchaser takes what is left upon distribution, after the settlement of the estate, including the charges and expenses of administration. Here, as already appears, the money was advanced for the purpose of supporting the family. It was in lieu of a family allowance, and it was loaned not to an heir, merely, but to the sole executrix of the estate, who is a trustee to protect the interests of creditors. Bergin v. Haight, 99 Cal. 52, 33 Pac. 760.

To give the appellant, under the name of "family allowance," the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law designed for a beneficent purpose into an instrument for the perpetration of a gross fraud. It is not to be supposed that a court possessed of all the facts and circumstances of the case would permit itself to be used for such purpose. "In

general, it may be stated that in all cases where, by accident or mistake or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." Story, Eq. Jur. §885. In Insurance Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362, Chief Justice Marshall laid down the rule in such cases as follows: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly appears to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chancery." In this case the respondent was entirely helpless, as against the proceedings in the probate court initiated and carried on by the appellants. The proceeding to set aside family allowance is ex parte. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question examined on the application for the family allowance. The case, therefore, does not fall within the restrictions against setting aside judgments of courts obtained through intrinsic fraud, such as U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, and other cases in that line relied upon by appellants. The respondent had no adequate relief, either by appealing from the order entered

in the probate court, or upon motion to set it aside. The probate court does not possess the requisite machinery to try a question of fraud. That is the peculiar province of a court of equity. In re Hudson's Estate, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 473; Wickersham v. Comerford, 96 Cal. 433, 440, 31 Pac. 358; Bergin v. Haight, supra. Wickersham v. Comerford, supra, was an action to set aside an order of the probate court designating and setting apart a homestead to the defendant, the widow of Richard Comerford. Said Comerford some time prior to his death had entered into an agreement of separation with his wife, Sarah, under which agreement the property of said parties was divided, and she relinquished all right as wife, in law or equity, for support and maintenance. Upon the execution of this agreement the parties immediately separated, and never again lived together. The wife, with her minor son, removed to Alameda county, upon the property which was conveyed to her under the deed of separation; and the husband remained at their former place of residence, in Sonoma county. After his death the wife took out letters of administration upon his estate, and thereafter made an application to have certain property in Sonoma county, which had been purchased by the husband with the proceeds of his separate estate, set apart to her as a homestead, which application was granted by the probate court of said county. On the application for setting apart the homestead, nothing was stated in reference to the deed of separation, or the division of the property thereunder. The complaint in the case charged a willful suppression of material facts, and the suggestion of a falsehood by the defendant, with the intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and averred that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors. This court held that that constituted fraud, and answers the contention on the part of the defendant there, that the only remedy

was an appeal from the order setting apart the homestead, as follows: "No doubt, that order was appealable, but, conceding that plaintiff's relation to the case [that of a mere creditor of the estate, whose claim had not been allowed] was such as would have entitled him to appeal from that order, yet he could have obtained no adequate relief by such appeal, since neither the fraud upon which the action is grounded, nor the fact that plaintiff was a creditor, could have been brought into the record on appeal from that order. Nor did plaintiff have an adequate remedy by motion to vacate the order, even conceding that he was entitled to make such motion, and had made it within the proper time. To say nothing of the disadvantage of trying an issue of fraud on such a motion, he could not have appealed from an order denying the motion, because the order sought to be vacated, viz.: the order setting apart the homestead, was itself an appealable order. [Citing a number of cases.] It will hardly be contended that a remedy for the wrongs complained of, thus restricted, is not defective and inadequate, as compared with an original equitable action, adapted to a thorough investigation of the issues, and in which all errors committed by the trial court may be corrected on appeal." Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547, was an original suit in the circuit court of the United States for the district of Louisiana, brought for the purpose of setting aside fraudulent and void sales made by a testamentary executor under the orders of the probate court in said state. In that case it was contended that the plaintiff was concluded by the proceedings in the probate court, which was alleged to have exclusive jurisdiction of the subject-matter, and that its decision was conclusive against the world,—especially against the plaintiff, who was a party to the proceeding. The supreme court of the United States, in its opinion, conceding that the administration of the estate there in question properly belonged to the probate court, and that, in a general sense,

the decisions of that court were conclusive and binding, especially upon parties, said: "But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed in pais or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it,"—citing a large number of cases. Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630, presented the question as to the jurisdiction of a probate court to make a sale of the lands there in controversy, and confirm sales reported by the guardian in said proceeding in probate. It was claimed there, as here, that the party complaining was bound by the judgment and orders in the probate court. The supreme court of the United States, however, says in its opinion: "But it is insisted that the circuit court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the probate court of Defiance county. If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable

jurisdiction on the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the circuit court is not bound to give relief according to recognized rules of equity as administered in the courts of the United States." To the same effect is Bowen v. Evans, 2 H. L. Cas. 257: "If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud."

It appears, therefore, from the foregoing cases,—and many others to the same effect might be cited,—that it was not necessary to first revise or set aside the orders made by the probate court. The desired purpose can be accomplished by allowing the sale ordered by that court to proceed, but to direct and control the disposition of the proceeds of such sale according to the right of the case, and this was done by the court below in its decree.

The orders herein for the family allowance, and also for the sale of the real estate, were made by the superior court in the exercise its probate jurisdiction. No appeal was taken from either of these orders, nor was any motion to modify or set them aside made in the proceeding before the probate department until after the time limited for an appeal therefrom, and the orders had thus become final; and no relief from them could be had in the probate department, even if under any circumstances that department could have given relief. When it appeared that the order for the family allowance had been made to reimburse the widow for moneys which she had

already expended in the support of her family, and that she had obtained these moneys from the assignors of the plaintiff herein by mortgaging her interest in the estate as security for their payment, and, without disclosing this fact, had, as executrix, obtained an order for the sale of the entire estate, under which the purchaser would take the title discharged of such mortgages, there was present the precise case in which a court of equity should interfere to control the enforcement of the judgment of another court by directing the application of the proceeds of that sale. In its judgment herein the superior court does not purport to set aside or modify either of these orders, but controls Mrs. Schell, in the disposition of moneys which may be received by her upon the family allowance. Neither does the court assume to determine the amount of the charges and expenses of administration which are to be paid out of the proceeds of the sale. These matters, as well as the return of sale that may be made under the order of sale, and the bearing upon the application for its confirmation, are within the jurisdiction of the probate department, and will be determined by it. The superior court by its judgment herein in no respect interferes with the jurisdiction of the probate department in reference thereto. It takes control of the disposition of the proceeds of the sale after the confirmation and payment of those charges and expenses, and at that point intercepts the appropriation by Mrs. Schell to herself of the proceeds of the sale of her interest in the real estate which she had mortgaged to the assignors of the plaintiff, by compelling the executrix to apply these proceeds, as far as may be necessary or applicable, in satisfaction of the liens which Mrs. Schell, as widow and heir of the deceased, had created upon that interest for the express purpose of obtaining the money for reimbursement of which the order of sale was made. The judgment merely compels the executrix to make the payment of the family allowance to the assignee of the widow in accordance with contracts there-

tofore made by her. The equitable relief thus sought could not be granted in the probate department of the court, for the reason that such relief is not within its probate jurisdiction. Sitting as a court of probate, the superior court exercises a special and limited jurisdiction under statutory procedure, and, although guided by principles of equity in the exercise of that jurisdiction, does not exercise its general jurisdiction in equity, but is limited to matters in probate, and, in the administration of the estates of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally the expenses incurred in the administration, and a temporary provision for the support of the family, including a homestead, where proper, are to be taken for the estate. This provision, however, is in reality a distribution of a portion of the estate to those who by virtue of the statute are entitled thereto. Under its probate jurisdiction the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for determining their rights to the proceeds of a sale derived under those for whose benefits the sale was ordered. For this want of jurisdiction in the proceeding for the administration of the estate, the equity jurisdiction of the court was properly invoked and exercised herein. The judgment, and the order denying the motion to vacate and set aside the said judgment, are affirmed.

We concur: TEMPLE, J.; HARRISON, J.; MCFARLAND, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment and generally in the opinion of justice VAN DYKE. I am not, however, prepared to say that the probate court, as such, is without jurisdiction, in making an order of family allowance

for the purpose of reimbursing moneys advanced for family support, to extend the benefit of its order to a third party who at the request of the executor or administrator has made such advances. I think, on the contrary, that, if in this instance the facts had been disclosed to the probate court at the time the order of sale was made, it would have been perfectly competent for that court to have directed payment to the plaintiff here of all sums advanced by her for the support of the family. This view does not, in my opinion, invalidate the conclusion that she can sustain the present action to enforce her equitable claim upon the fund which will result from the sale of the property. She had no actual notice of the proceeding in the probate court, and her failure to make her claim there was not her fault, but the fault of the defendant.

BACON v. BACON *et al.*

(S. F., 3, 741.)

Supreme Court of California, Feb. 7, 1907.

(150 Cal. 477.)

1. EXECUTORS—DECREE OF DISTRIBUTION—REVIEW IN EQUITY—MISTAKE—FRAUD.

A decree of distribution is not so essentially a part of the probate proceeding in which the will was established that it cannot be reviewed by a suit in equity for fraud or mistake.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 22, Executors and Administrators, §1293.]

2. SAME—JURISDICTION OF EQUITY—STATUTES.

Since the Constitutions of 1849 and 1879 conferred on the superior court such jurisdiction to review judgments and decrees for fraud or mistake as had been formerly possessed by courts of equity, Code Civ. Proc., §1666, declaring that distribution decrees shall be conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal, and section 473, providing that, on motion in the same cause or proceeding instituted within six months after judgment, a party may be relieved from a judgment taken against him through his mistake, inadvertence, or excusable neglect, afforded merely a cumulative remedy, and did not displace the constitutional power of the superior court to set aside a distribution decree for fraud or mistake, by an original proceeding in equity.

3. JUDGMENT—MISTAKE—RELIEF IN EQUITY.

Relief may be given in equity against a decree which was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 30, Judgment, §§780, 785.]

4. Executors—Decree of Distribution—Setting Aside—Mistake.

Testator declared that, if his estate was worth more than $250,000, the wife of his son and the husbands of his two daughters should receive $10,000. The estate was worth more than the sum specified, and on the reading of the will the word "ten" was by mistake read as "two," for which it might easily be taken. Testator's three children were appointed his personal representatives, and had copies of the will made for each legatee, in which the mistake was continued. The subsequent proceedings in the estate were conducted by the use of the copies, and plaintiff, the wife of the son, was induced by the personal representatives to execute a receipt in full of her legacy on the payment to her of $2,000, and such personal representatives thereafter obtained a decree of distribution, at which plaintiff did not appear and was not represented, which fixed her interest in the estate at $2,000. *Held* that, as there had never been an real contest with reference to the amount of plaintiff's legacy, the mistake was not one of the court by which the decree of distribution was entered, but of the parties interested in the estate, and that it was therefore properly vacated on that ground.

5. Same—Laches.

Nothing having occurred to arouse plaintiff's suspicions as to the truthfulness of the representations of her husband, who was an executor, or to doubt the good faith of the others, until after dissensions arose between herself and husband which ended in a divorce, after which she learned of the mistake and began the action to vacate the decree a short time thereafter, she was not guilty of laches.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 22, Executors and Administrators, §1305.]

6. Limitation of Actions—Accrual Mistake—Discovery.

Limitations did not begin to run against a suit to set aside a distribution decree for mistake until the mistake was discovered.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 33, Limitation of Actions, §§337, 476.]

7. Executors—Decree of Distribution—Vacation—Evidence—Will.

A suit to set aside a distribution decree for mistake was a direct attack thereon, in which the probated will was competent evidence to prove the error.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Mamie C. Bacon against Frank Page Bacon and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial defendant Frank Page Bacon and certain others appeal. Affirmed.

R. Brent Mitchell (John A. Percy, of counsel), for appellants. Bishop & Wheeler and W. W. Deamer, for respondent.

Shaw, *J.* On January 19, 1893, Henry D. Bacon died, leaving surviving him his widow, Julia A. Bacon, and three children, namely, Frank Page Bacon, Ella Etta Bacon Soule, and Carrie Jennie Bacon. His will was duly admitted to probate on March 13, 1893. By its terms the bulk of the testator's property, after payment of debts, was bequeathed to his three children aforesaid. It contained the following clause, out of which this litigation arises, to wit: "If my said estate is worth as much as two hundred and fifty thousand dollars, at my death after payment of liabilities as aforesaid, I desire that my legal representatives shall pay to the wife of my said son Frank the

sum of ten thousand dollars and to the husband or husbands of my said daughters Ella Etta and Carrie Jennie each the sum of ten thousand dollars." The plaintiff, at that time, was the wife of said son Frank. The estate was worth much more than $250,000, and she was therefore entitled to the legacy of $10,000. The three children were appointed executor and executrices of the will, and duly qualified and acted as such. Shortly after the testator's death, and before the will was probated, the children and other parties interested, except the plaintiff, met for the purpose of reading the will. In reading it, by mistake the word "ten" was read as "two" where it occurs in the above-quoted clause. This mistake was carried into all the subsequent proceedings, was not perceived by any of the interested parties or any person concerned in the administration, the respective legacies were paid as legacies of $2,000 each, that sum was accepted and receipted for as payment in full by the plaintiff, all parties then believing that the legacies were each for $2,000 only, and a petition for distribution was thereafter filed, notice thereof duly given, and a decree of final distribution of the estate made on December 18, 1896, reciting the said legacy as a legacy for $2,000, declaring its full payment, and distributing the residue to the defendant Bacon Land & Loan Company, a corporation organized to receive and hold the property of the estate, to which said residuary legatees had theretofore conveyed there respective interests in exchange for a proportionate amount of the corporation stock. It is also claimed that this decree was obtained by fraud, as well as by reason of the mistake above mentioned.

This suit was begun on July 31, 1899, against the residuary legatees above named, both in their

individual and representative capacities. The widow and the said corporation are also made parties defendant. The object of the action is to obtain a judgment declaring that the legacy bequeathed to plaintiff by the will was $10,000; that of that sum $8,000, with interest, remains unpaid; that the decree of distribution with respect to the recitals that the legacy was $2,000 was satisfied be held void; that the said sum of $8,000 and interest be declared a lien and charge on the property of said estate so distributed to said corporation, or on the stock of said corporation issued to said legatees in exchange for said property in case the property could not be charged; that said property or stock be declared to be held in trust for plaintiff, so far as may be necessary for the payment of the said balance with interest; and that, if not paid, then that said property be sold and payment made out of the proceeds. The Court gave judgment substantially as prayed for against the three residuary legatees, declaring said balance and interest a lien and charge on the stock of said corporation belonging to them, and that they held said stock in trust for the plaintiff, so far as should be necessary for the payment of the balance, enjoining any transfer by them and providing for its sale to satisfy said lien. It also gave personal judgment against said legatees in favor of plaintiff for the amount of said balance and interest, and declared her receipt for full payment cancelled. The Court refused to declare a lien or charge against the property of the estate held by the corporation and gave judgment in favor of said corporation for its costs. From this judgment, and from an order denying their motion for a new trial, the said Frank Page Bacon, Ella Etta Bacon Soule, and Carrie Jennie Bacon appeal.

There is also an appeal by the same parties as personal representatives of the deceased, Henry D. Bacon; they having never been discharged from that trust. There is no judgment against them in that capacity, except so far as the judgment declaring void the recitals in the decree and cancelling the receipts may be so construed. Their interests in that capacity are concerned only so far as that part of the judgment may require further proceedings in the administration of the estate. This appeal has not been argued by either party, and need receive no further consideration here.

The first proposition of the appellants is that the Superior Court had no jurisdiction of the subject matter of the action. The complaint states a cause of action of the class formerly cognizable in equity and now within the jurisdiction of the superior courts by virtue of the constitutional grant to those courts of "original jurisdiction in all cases in equity." Article 6, §5. The appellants claim that decrees of distribution constitute an exception to the general rule, and cannot be reviewed in equity upon the ground of fraud or mistake.

1. The proposition that a decree of distribution is subject to review in equity, upon a showing that it was procured by fraud or mistake, appears to be settled by the decisions of this court in Baker *v.* O'Riordan, 65 Cal., 368, 4 Pac., 232; Sohler *v.* Sohler, 135 Cal., 323, 67 Pac., 282, 87 Am. St. Rep., 98; Estate of Hudson, 63 Cal., 457; Dean *v.* Superior Court, 63 Cal., 478; Wingerter *v.* Wingerter, 71 Cal., 110, 11 Pac. 853; Buckley *v.* Superior Court, 102 Cal., 10, 36 Pac., 360, 41 Am. St. Rep., 135. In Baker *v.* O'Riordan, *supra*, a decree of distribution to the defendant had been obtained by the consent of an attorney, who,

fraudulently and without authority, appeared for Baker, who was entitled as husband of the decedent. It was a case of the kind described in U. S. *v.* Throckmorton, 98 U. S., 65, 25 L. Ed., 93, as a case "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat," and which is classed therein as among the instances of fraud for which a new suit would be sustained to set aside the judgment so obtained. In regard to the jurisdiction, this court, in Baker *v.* O'Riordan, said: "The equitable jurisdiction to cancel and set aside or to restrain judgments and decrees of any court, obtained by a fraud practiced upon the court and the losing party, is well settled and familiar." 2 Pomeroy, Eq. Jur., 919. * * * We have no doubt of the right of the plaintiff, under the findings, to have the decree assigning his share of the estate of his wife to the defendant cancelled and set aside." In Sohler *v.* Sohler, *supra,* the plaintiff sued to set aside a decree of distribution induced by the fraud of the defendants, coupled with the mistake or ignorance of the plaintiff, the ignorance being also the result of the fraud. The court below had sustained a demurrer to the complaint. The Supreme Court reversed the judgment, held that the Superior Court had jurisdiction of the action and power to review the decree of distribution, and to declare that the defendants held as involuntary trustees of the plaintiff the property improperly vested in them by the decree. This is substantially the same relief as that given in the case at bar. The other cases above cited contain declarations similar in effect to the above quotation from Baker *v.* O'Riordan, and, although they may be *obiter dictum,* we think they correctly state a settled rule of equity jurisprudence.

The decisions cited by the appellants are not in conflict with these conclusions. In Langdon *v.* Blackburn, 109 Cal., 19, 41 Pac., 814, it seems to have been conceded that, while the probate of a will could not be reviewed in equity, a decree of distribution was subject to such attack in a proper case of extraneous or collateral fraud, and it was held that the showing of such fraud in that case was insufficient. William Hill Co. *v.* Lawler, 116 Cal., 360, 48 Pac., 323; Jewell *v.* Pierce, 120 Cal., 79, 52 Pac., 132; Cunha *v.* Hughes, 122 Cal., 111, 54 Pac., 535, 68 Am. St. Rep., 27; and McKenzie *v.* Budd, 125 Cal., 600, 58 Pac., 199—were collateral attacks upon decrees of distribution, and they simply announce that the well-known rule protecting judgments against collateral attack, except for want of jurisdiction, is applicable to such degrees. They have no bearing on the question. Goad *v.* Montgomery, 119 Cal., 552, 51 Pac., 681, 63 Am. St. Rep., 145, and In re Trescony, 119 Cal., 568, 51 Pac., 951, merely decide that the decree of distribution supersedes the will, and that, so long as the decree stands unreversed by any direct attack, the will cannot, in any collateral inquiry, be used to impeach the decree. Toland *v.* Earl, 129 Cal., 148, 61 Pac., 914, 79 Am. St. Rep., 100, was an action in the Superior Court to construe a will and obtain a decree directing the same court as to the manner in which it should distribute the estate then in course of administration in that court. It was held that such a proceeding in equity was no longer necessary, that the same relief could be obtained from the same court in the regular course of the probate proceedings, and that the former jurisdiction of equity was now exercised through the same court by means of the proceeding for distribution, or a proceeding under section 1664, Code Civ. Proc., which were made the exclusive modes of ob-

taining a judicial construction of a will. Lynch *v.* Rooney, 112 Cal., 282, 44 Pac., 565, was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. Pico *v.* Cohn, 91 Cal., 133, 25 Pac., 970, 27 Pac., 537, 13 L. R. A., 336, 25 Am. St. Rep., 159; U. S. *v.* Throckmorton, *supra.* If the latter part of the opinion in this case was intended to declare that such decree may not be reviewed for extrinsic fraud in procuring them to be made, it must be considered as overruled by the decision in Sohler *v.* Sohler, *supra.* In Mulcahey *v.* Dow, 131 Cal., 73, 63 Pac., 158, the opinion concedes that a distributee may, in a proper case, be held as an involuntary trustee, but decides that the fraud there shown was not extrinsic or collateral.

It is urged, with respect to the jurisdiction, that decrees of distribution, being a part of the same probate proceeding as the decree probating the will, must be governed by the same rule, and that, as in State *v.* McGlynn, 20 Cal., 231, 262, 81 Am. Dec., 118, and Kieley *v.* McGlynn (Broderick's Will), 88 U. S., 503, 22 L. Ed., 599, it was decided that decrees probating wills are not subject to review in equity for fraud or mistake, it would follow that a decree of distribution cannot be so reviewed. In view of the decisions we have cited to the contrary, this proposition is clearly untenable. Furthermore, the rule denying such power to review the probate of a will, while it is declared by the above decisions, and perhaps by the greater number of decisions elsewhere, is universally admitted to be an exception to the general rule that all final judgments are subject to such attack. The reasons given in support of the exception are gen-

erally declared in the opinions to be unsatisfactory and illogical, and the discussions usually end with the statement that, whether for good reasons or not, the exception is firmly established, and upon that ground must be adhered to. An exception so poorly supported by reason should not be extended to a new class of cases.

2. It is further claimed that such review is prohibited by the provisions of section 1666 of the Code of Civil Procedure, which, on this point, is as follows: "In the order or decree the court must name the persons and proportions or parts to which each shall be entitled. * * * Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal." The proposition proves too much. It necessarily concedes that such jurisdiction is conferred by the Constitution and would remain in the Superior Court, but for this statute, which is supposed to divest it. The Legislature does not possess power to divest the court of its constitutional jurisdiction. It may change the practice or procedure, the mere method by which the jurisdiction is exercised (Ex parte Harker, 49 Cal., 467), but it cannot take away the jurisdiction entirely, nor substantially impair it. No adequate new procedure has been provided for the exercise of this jurisdiction, and, if it exists at all, it must be exercised by the long-established method of an independent suit. It is true that section 473 of the Code of Civil Procedure provides that, upon motion in the same cause or proceeding, instituted within six months after judgment, a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. This would undoubtedly also include mistake superin-

duced by the fraud of the other party, and it does provide a new method whereby some relief can be obtained on motion, similar to that here sought by an independent suit. But this provision has never been considered as an exclusive method for the exercise of the equity jurisdiction, nor as an adequate substitute for the right to proceed by action. It is a cumulative remedy, and does not displace the remedy in equity. Baker *v.* O'Riordan, *supra.* We have recently held, not only that it does not displace the equitable remedy, but also that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause. Estudillo *v.* Security L. & T. Co. (Cal. Sup.), 87 Pac., 19. Also, Freeman on Judgment, § 511; Simpson *v.* Hart, 14 Johns., 63; Wistar *v.* McManes, 54 Pa., 318, 93 Am. Dec., 700. It follows that the jurisdiction still remains, notwithstanding the provisions of that section.

It is suggested that, at the time the present Constitution was adopted, section 1666 was in force, and its effect was that courts of equity were thereby deprived of jurisdiction to vacate decrees of this class; that the jurisdiction in equity conferred by the constitutional grant must be understood to include only the jurisdiction as then existing and as limited by that section; and hence that it did not include the power to vacate judgments in cases of this class. To this there is a sufficient answer. The grant of this jurisdiction is not a new provision. It was conferred upon the district courts by the Constiution of 1849, in identical language, and this had been construed to give that court the same jurisdiction as that formerly possessed by the equity courts. Stanford *v.* Head, 5 Cal., 298; People *v.* Davidson, 30 Cal., 391; Rosenberg *v.* Frank, 58 Cal., 400. In Sanford *v.* Head, *supra,* it was

held that this jurisdiction included power to set aside a judgment for fraud, and in Baker *v.* O'Riordan, *supra*, this doctrine was applied to a decree of distribution. Hence, this provision of section 1666, if we consider that it was intended to divest a party of this equity jurisdiction, must have been unconstitutional and void in 1866, when it was first enacted. St., 1865-66, p. 767, c. 548. The Constitution of 1879 gave the jurisdiction to the Superior Court by the use of the same language as that of 1849, and it must be construed to have the same effect. The effect of the words used cannot be changed, and the jurisdiction limited, by reference to a void statutory provision, having only a nominal existence at the time of the adoption of the new Constitution. The grant of jurisdiction in all cases in equity, made in 1879, was of the same effect as the similar grant in 1849, and conferred upon the Superior Courts the jurisdiction previously vested in the district courts, and therefore it was unaffected by the void statute.

We think, however, that section 1666 was not intended to have the effect claimed. A statute should be so construed as to make it constitutional, if it is reasonably possible. People *v.* Frisbie, 26 Cal., 139; French *v.* Teschemaker, 24 Cal., 554. The provision may reasonably be interpreted to mean no more than that the decree of distribution should have the same force and effect as other final judgments; that is to say, that it should not be subject to collateral attack, but only to direct attack on appeal, or as otherwise provided by law. This construction was, in effect, given to it by the decision in De Pedrorena *v.* Superior Court, 80 Cal., 144, 22 Pac., 71. The rigid construction contended for would as completely cut off the power of the court to vacate such decree upon proceedings by motion, under section 473, Code Civ. Proc.,

as it would the power of review by a suit in equity. Yet in that case it was held that the court had power to set aside a decree of distribution, on motion, under section 473, begun within six months after its rendition, notwithstanding the provision of section 1666 aforesaid. Thus, in effect, it declared that the latter section does not exclude any form of direct attack. A suit to review a judgment for fraud or mistake is a direct proceeding against such judgment, and not a collateral attack. Bergin *v.* Haight, 99 Cal., 56, 33, Pac., 760. We conclude that the provisions of section 1666 do not prevent a review of a decree of distribution by a suit in equity, in a proper case.

3. It is urged that the power to review judgments extends only to cases where they have been procured by fraud, and that it does not exist with respect to judgment wrongfully given by reason of mistake either of the Court or of the injured party. No such distinction is recognized by the authorities. The text-books all declare that such relief can be given where the former judgment was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party. Black on Judgments, §381; 2 Freeman on Judgments, § 500; 2 Story Eq. Jur. § 885; 2 Beach on Injunctions, § 701; 2 Pomeroy, Eq. Jur. § 871; 3 Pomeroy, Eq. Jur. §§1376, 1377; 16 Am. & Eng. Ency of Law, p. 383; 1 High on Injunctions, §209 *et seq.* Indeed, the cases on the subject of mistake allow relief from a judgment where the subject-matter of the mistake approaches more closely the actual merits of the former inquiry than in cases of fraud. In Quivey *v.* Baker, 37 Cal., 465, and Busey *v.* Moraga, 130 Cal. 588, 62 Pac., 1081, a mortgage, by mistake, described a lot not owned by the mortgagor, instead of the one intended. It was foreclosed, and the same

mistake was inadvertently carried into the judgment, the sale, and the sheriff's deed. It was held that an action would lie to correct all the mistakes, including the mortgage, the judgment, and the deed. In Gerig *v.* Loveland, 130 Cal., 512, 62 Pac. 830, one who held two mortgages for the same debt, by mistake foreclosed the first alone, which covered less property than the second, and was insufficient to pay the debt. The Court declared that he could maintain an action to cancel the first decree, and to forclose the second mortgage against a subsequent judgment creditor, thus avoiding the bar of section 726, Code Civ. Proc., allowing but one action on a debt secured by a mortgage. In Merrill *v.* Bank, 94 Cal., 59, 29, Pac., 242, a judgment by default was rendered against two makers of a note. One of them afterwards discovered that the note had been fully satisfied by the other before the suit was begun. An action by him to set aside the judgment, or to have it declared satisfied as to him, was sustained; it appearing that he was not negligent in failing sooner to discover the defense. Ford *v.* Ford, 1 Walk. (Miss.) 505, 12 Am. Dec. 587, is substantially to the same effect. In Cohen *v.* Dubose, 1 Harp. Eq. (S. C.) 102, 14 Am. Dec. 709, there was a trial by jury in an action at law on a note. The note was given in evidence, and the jury returned a verdict for plaintiff for the amount of the principal thereon; the interest being omitted by their mistake. It was held that the plaintiff could maintain a suit in equity to correct the mistake and compel payment of the interest, and that the testimony of the jurors could be introduced in proof of the mistake. Chief Justice Marshall, in Marine. I. & S. Co. *v.* Hodgson, 7 Cranch, 336, 3 L. Ed. 362, states the rule thus: "It may safely be said that any fact which clearly proves it to be

against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that Court that the defense ought to have been sustained at law."

We are satisfied that the Court below had power to entertain the suit and give the relief awarded by the judgment appealed from. It remains for us to consider the case upon its merits.

4. A photographic copy of the will is inserted in the record. Upon a casual reading, a person of ordinary skill in deciphering penmanship might easily mistake the word "ten," in the two places where it appears therein, for the word "two," and believe that the legacies were each for $2,000; but, upon a careful reading, and especially upon a comparison with the formation of the same letters in other parts of the will, and without the aid of a microscope, no person of experience could doubt that the word is "ten," and that the legacies are each for $10,000, and not for $2,000. Without doubt the testator did bequeath to the plaintiff a legacy of $10,000. The original will was filed and probated as it was written by the testator, and, consequently, the estate exceeding $250,000, the probate of the will clearly established that the plaintiff was entitled to a legacy of $10,000.

At the time of the first reading of the will, when the words "ten" were erroneously read by all parties present as "two," the attorney of the executors was present, and was directed by them

to have typewritten copies of the will made and sent to the parties interested. This was immediately done; the copyist by mistake writing the amount of the legacy as "two thousand dollars." Thereafter these copies were used in the subsequent proceedings, and the original was not again carefully read or examined by any person until some three years after the estate was distributed. Thus the mistake was perpetuated and repeated in the final decree. The plaintiff did not expect that any legacy would be left to her, and did not know that anything was given to her by the will, until she was informed by her husband shortly after the first reading thereof. He told her that it gave her a legacy of $2,000. A day or two later she received the copy from the executors, which gave her the same information. She had every reason to believe that the information was correct. It came from those on whom she had a right to rely. We may presume that she had been accustomed to rely on her husband, and had found him trustworthy. She did rely on them and believed that the legacy was, in fact, $2,000, and during the whole course of the administration she had no occasion for even a suspicion that it was otherwise. Under these circumstances, the Court properly found that she cannot be charged with neglect in failing to discover the mistake. Furthermore, the information came from persons occupying fiduciary relations towards her. Her husband first informed her, and she then received the copy from the executors. Afterwards, and before the petition for distribution was filed, upon her request for payment of the supposed balance of her legacy, the individual defendants, in their representative capacity, prepared a receipt in full, in effect stating therein that the balance of the principal of her legacy was but $1,500 ($500

having been previously paid), which they presented to her, and demanded that she should sign upon payment of said balance, which she did, and the supposed balance was then paid by them to her. This was equivalent to a statement by them that her legacy was but $2,000. Executors occupy trust relations towards the legatees, and are bound to the utmost good faith in their transactions with the beneficiary. 1 Story, Eq., Jur. § 218; Robins v. Hope, 57 Cal. 497. They were also residuary legatees, and hence whatever was lacking in full payment to the plaintiff was so much gained to them. They are therefore not in any position to claim that the plaintiff, in relying on their own statements regarding the amount of the legacy, was lacking in diligence.

At the hearing of the petition for distribution the original will, in the handwriting of the testator, was on file, but it was not produced, examined, or read by or to the Court. The petition was prepared from one of the typewritten copies of the will. It stated the legacy as for $2,000, and that it had been fully paid. This statement was read or stated to the Court by the attorney for the executor and executrices, and he also then stated that it was a correct statement of the contents of the will. The Court accepted his statement as true, and gave judgment for distribution accordingly. That all parties concerned, including the Court, were acting under the influence of the mistake is unquestionable. It is claimed that it is not extrinsic or collateral to the case that the amount of the legacies and the purport and effect of the will were the precise things which the Court was to ascertain and determine by the judgment, and that the mistake in reading the will was a mistake of the Court, intrinsic to the action, which cannot be reviewed in any other court. If the plaintiff

had been present at the hearing, contending that the will gave her $10,000, had presented the point to the Court, and the Court had thereupon read the word "ten" as "two," and had made the distribution as it was made by the judgment appealed from, no doubt she would be precluded from any relief by the way of equitable review, no matter how plain the mistake of the Court would appear. The mistake would then be a mere error in the consideration of the evidence in a case fully presented to the Court, an error of the class which human tribunals are subject to in any case, and which cannot be reviewed in equity. There would also be a complete remedy at law. The party injured would have timely notice of the error, and could pursue the usual mode of review by motion for a new trial and appeal.

The general rule as to what constitutes extrinsic fraud or mistake is clearly stated by the United States Supreme Court in U. S. *v.* Throckmorton, 98, U. S., 65, 25 L. Ed. 93. After stating the general rule that a bill in equity will not lie to set aside a judgment obtained by means of perjured testimony, or forged documents, introduced in evidence in support of a contested issue of fact, that Court says: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, *no adversary trial or decision of the issue in the case.* Where the unsuccessful party has been *prevented from exhibiting fully his case* by fraud or deception practiced upon him by his opponent, as by keeping him away from court; a false promise of a compromise; or where the defendant had never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent

a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side—these, and *similar cases which show that there never has been a real contest at the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing." (The italics are ours.) This statement was approved by this Court in Pico *v.* Cohn, 91 Cal., 135, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep., 159. These cases refer to fraud as the preventing cause of the real contest, adversary trial, or fair submission. The cases related to fraud, and hence the discussion was confined to that subject, but the rule is the same where the preventing cause is mistake, influencing the action, or inaction, of the injured party. Bibend *v.* Kreutz, 20 Cal., 114; Merrill *v.* Bank, 94 Cal., 59, 29 Pac. 242; Marine Ins. Co. *v.* Hodgson, 7 Cranch, 336, 3 L Ed. 362; Ford *v.* Ford, 1 Walk. (Miss.) 505, 12 Am. Dec. 587; Wilson *v.* Boughton, 50 Mo., 17; Drew *v.* Clarke, Cooke (Tenn.) 373, 5 Am. Dec., 698; Rust *v.* Ware, 6 Grat., 50, 52 Am. Dec., 109; Currier *v.* Esty, 110 Mass., 536; Epes *v.* Williams, 17 S. E., 235, 89 Va., 794; Busey *v.* Moraga, 130 Cal., 586, 62 Pac., 1081; note to Oliver *v.* Pray, 19 Am. Dec., 605. See, also, the citations to the textbooks under subdivision 3 of this opinion. The gravamen of the rule thus expressed lies in the fact that "the successful party has been prevented from exhibiting fully his case," and, consequently, that there has been "no adversary trial or decision of the issue," no "real contest at the trial," or, as stated in Pico *v.* Cohn, no "fair submission of the controversy." Where the unsuccessful party has been thus hindered, he is not to be refused relief

on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action and concluded by the original judgment beyond reach on collateral inquiry. It is because such judgment does conclude all parties so long as it stands unrevoked and unaffected by any direct attack, not only as to the facts actually in issue, but also as to all facts not in issue, but which might constitute a possible defense, and is therefore injurious, that there is ground for the interposition of equity to give this form of relief. To deny relief where the fact is technically in issue, though, by reason of the mistake or fraud, not controverted or contested as the trial or hearing, would be to destroy the equitable remedy in a large class of cases in which it has been hitherto administered.

The case at bar comes fully within these principles. The plaintiff, by reason of the common mistake, believed that her legacy was only $2,000, instead of $10,000, as it was in fact. She had been fully paid the $2,000, which she believed to be the extent of her demand. Her claim was, as she supposed, satisfied, and she was thereby fully justified in assuming that she had no further concern with the estate and no interest in the distribution. As we have seen, the mistake was not caused by her culpable negligence. In this state of mind she would properly consider that she should not appear in the proceeding in which she had no interest. One who has no defense to an action against him, or no interest in a proceeding in which he is cited, is not negligent, or chargeable with laches, in failing to appear there-

in, but is thereby doing his legal duty to the court. The plaintiff testified, in substance, that, if she had not been misinformed in regard to the amount of her legacy, she would have made inquiry about it. The court below was justified by the circumstances disclosed by the evidence, as well as by this direct testimony, in finding that, by reason of her mistake as to the contents of the will, the plaintiff was induced to refrain from appearing in the proceeding for distribution and there contesting the statement that her legacy was but $2,000 and claiming the true amount thereof. It is therefore a fact that by reason of this mistake she was prevented from exhibiting fully her case, and that, as the result, there was no adversary trial, no real contest, and no fair submission of the question whether her legacy was $2,000 or $10,000. The obvious result was the decision of the court, based on the uncontested facts set forth in the petition for distribution, that the plaintiff had been paid in full, with the corresponding decree distributing to the residuary legatees $8,000 of the money of the estate, which, of right, belonged to the plaintiff. The mistake of the plaintiff, which led to this injury, was clearly caused by matters extraneous and collateral to the merely formal inquiry made by the court upon the hearing.

The court further found that her failure to appear was induced by both the actual and constructive fraud of the defendants. We do not find it necessary to consider the sufficiency of the evidence to support these respective findings of fraud. There is sufficient proof of mistake, as we have shown, and the judgment is fully sustained by the findings on that subject.

The plaintiff was not guilty of neglect or laches in the delay in beginning the present action. She

did not discover the mistake until a short time before the action was begun. We do not find anything in the evidence which would necessarily put her on inquiry as to the amount of the legacy, or cause her to suspect that there had been a mistake concerning it. The dissensions between herself and her husband, and their consequent separation, occurring shortly before the time of the last payment upon the legacy, and the subsequent divorce, had no reference to the legacy, or to the will, and were not of a character to arouse in her a suspicion that her previous information from him concerning it was false, or a doubt of the good faith of the other defendants. She testified that she had no such doubt or suspicion. The delay does not appear to have been in the least injurious or prejudicial to the defendants in respect to their defense in this action, or in any other respect, and therefore one element of laches, as distinguished from the bar of the statute of limitations, is wanting. Cahill *v.* Superior Court, 145 Cal., 47, 78 Pac., 467; Mayer *v.* Mayor, 63 N. Y., 455; Lawrence *v.* American Nat. Bank, 54 N. Y., 432, Nat. Bank of Com. *v.* Nat. Mechanics' Bank, 55 N. Y., 211, 14 Am. Rep., 232; Snyder *v.* Ives, 42 Iowa, 157 U. S. Bank *v.* Georgia, 10 Wheat., 333, 349, 6 L. Ed., 334.

The action was not barred by the statute of limitations. The plaintiff had no actual knowledge of the mistake, prior to the distribution, nor until the accidental discovery, shortly before the action was begun. The statute did not begin to run until that discovery occurred. The causes which produced the cessation of the intimate relations between plaintiff and the defendants did not put plaintiff upon inquiry to the extent necessary to charge her with constructive notice of the mistake, prior to the actual discovery. The dif-

ferences between them, as we have stated, would not necessarily affect her confidence in the honesty and integrity of the defendants, in respect to the administration of the estate.

There are other particulars wherein it is claimed that the evidence does not sustain the findings, but it is not necessary to discuss them in detail. A careful consideration of the evidence in the record satisfies us that it is sufficient to prove all the facts necessary to support the judgment. The will was competent evidence to prove the mistake, the right of the plaintiff, and the injury to her from the erroneous distribution. Decisions holding that a will is not admissible on collateral inquiry, after probate and distribution, to prove that it was disregarded, or incorrectly construed, by the court in making distribution of the estate, have no application here. This is not a collateral attack on the decree of distribution. It is a direct attack thereon. Bergin *v.* Haight, 99 Cal., 56, 33 Pac., 760. In such direct proceedings to impeach the decree the will is competent evidence to prove the error and the injury. It is unnecessary to discuss the other errors of law assigned. They are either not well taken, or they do not affect the result.

The judgment and order are confirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MCFARLAND, J.; LORIGAN, J.; HENSHAW, J.

CAMPBELL-KAWANNANAKOA *et al* v. CAMPBELL *et al.*

(S. F. 4,175.)

(Supreme Court of California. Oct. 9, 1907. Rehearing Denied Nov. 7, 1907.)

(152 Cal. 201.)

1. APPEAL—TIME FOR TAKING—STATUTORY PROVISIONS.

Code Civ. Proc. §939, subd. 1, designating 60 days as the time for taking an appeal, refers only to exceptions to a decision on an issue of fact on the ground that it is not supported by the evidence, and not to appeals from judgments sustaining demurrers to pleadings.

2. PERPETUITIES—SUSPENSION OF POWERS OF ALIENATION.

A trust created by will suspending the power of alienation of real property for a longer period than during the continuance of lives in being at the death of the testator is void under Civ. Code §§715, 716, relating to restraints upon alienation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 46, 47.]

3. TRUSTS—EXPRESS—VALIDITY.

A trust created by will by which real property is devised in fee simple to the trustees to be conveyed by them to the beneficiaries is void.

4. PLEADING—ALLEGATIONS ON INFORMATION AND BELIEF.

Allegations in a complaint in equity as to matters peculiarly within the knowledge of defendants, and as to which plaintiffs could learn only from statements made by others, may be based on information and belief.

5. TRUSTS—VALIDITY—TRUSTS OF REAL PROPERTY—WHAT LAW GOVERNS.

The title and disposition of real estate being governed

by the lex loci rei sitæ, the validity of a trust therein, created by a will, must be determined by the same law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §2.]

6. Wills—Void Trust in Will—Disposition of Property.

A testator's intention to disinherit his heirs in unavailing where a trust attempted to be created to that end by will is void, but the property attempted to be so conveyed descends to them, as provided by Civ. Code, §1386, subd. 1, relating to the distribution of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§2200-2203.]

7. Judgment—Equitable Relief—Attacking for Fraud.

Under the jurisdiction of equity to afford appropriate relief from judgments, where the judgment assailed is such that it cannot properly be set aside, equity may prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary, or his successor with notice, a trustee for the defrauded party.

8. Same—Collateral Attack—Action by Heirs Against Fraudulent Trustees.

An action to obtain a decree adjudging persons to hold property as trustees for heirs, the title to which they are alleged to have fraudulently procured in the administration of decedent's estate as trustees under a void trust in the will, is not a collateral, but a direct attack, on the judgment of the probate court.

9. Same—Probate Orders—Equitable Relief—Attacking for Fraud.

Where the trustees of a void trust in a will, by concealing the facts from the probate court, have a sham sale of

the property under an order of court and obtain a decree of distribution of the proceeds to themselves, thus carrying into effect a scheme to remove the property from administration and possession of nonresident heirs, it is a fraud extrinsic to the questions determined by the judgment of the probate court, and warrants equitable relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §838.]

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Abigail Campbell-Kawannanakoa and others against Alice K. Campbell and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

H. L. Gear and Charles W. Slack (J. J. Dunne, of counsel), for appellants, C. J. Bird (Charles Clark, of counsel), for respondents.

ANGELLOTTI, J. This is an appeal by plaintiffs from a judgment rendered against them on the sustaining of demurrers to their amended complaint.

In addition to the ground of want of facts, various other grounds were specified in the demurrers, such as want of jurisdiction, improper joinder of causes of action, defeat of parties, ambiguity, uncertainty, and unintelligibility. Defendants, however, do not discuss in their briefs any of these grounds, but confine themselves to the general ground of want of facts. We see no force in any of the other objections made by demurrer, and will not discuss them.

By the bill of exceptions settled for use on this appeal, it appears that plaintiffs, at the time of the sustaining of the demurrers, asked leave to amend their amended complaint by adding thereto certain allegations, a copy of which proposed amendment was served upon defendants and submitted to the court, and that the application was denied by the court solely upon the ground that, if said proposed amendments were considered as incorporated

in the amended complaint, said amended complaint would not state a cause of action. Under the circumstances, we have no doubt that the proposed amendments should be taken into consideration in determining whether a cause of action was stated by plaintiffs in the lower court. If, with the aid of such amendments, a cause of action would have been stated in the complaint, and the amendments were essential to a statement of a cause of action, it must be held, inasmuch as the court based its refusal solely on the ground stated, that the court erred in refusing leave to amend. There is nothing in the contention that the bill of exceptions cannot be used on this appeal because the appeal was not taken within 60 days after the rendition of the judgment. The statute relied on in this regard (subdivision 1, §939, Code Civ. Proc.) refers only to exceptions to a decison on an issue of fact on the ground that it is not supported by the evidence given on the trial.

The action is one in equity by certain heirs of James Campbell, deceased, to obtain a decree adjudging the defendants to hold one-half of certain valuable real property in the City of San Jose, in this state, known as the "St. James Hotel property," with the improvements thereon, as trustees for plaintiffs, and for an accounting as to the rents and profits thereof received by defendants, on the ground of the alleged fraud of defendants in procuring the title in the course of administration of the estate of the deceased in the superior court of Santa Clara county.

The case stated by the amended complaint was as follows: The plaintiffs are three children of James Campbell, deceased, and of defendant Abigail Campbell-Parker, his surviving wife; two of them being minors. Defendant Alice K. Campbell is the only other child of said parties, and said surviving wife and four children are the sole heirs at law of the deceased. Said James Campbell died at Honolulu, in the territory of Hawaii, on April 21, 1900, being a resident of that place at the

time of his death. He then owned the whole of the said St. James Hotel property as his separate property. He left a will by which he devised one-third of his personal property to his widow, and assumed to devise all the rest of his property to his wife and defendants Carter and Brown as trustees. The trust attempted to be created by the will was contrary to the laws of this state prohibiting the suspension of the power of alienation for a longer period than during the continuance of lives in being at the time of the death of the testator, and was therefore void in its creation as to real property situated within this state. Civ. Code, §§715, 716; In re Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 64. It was also void as to such real property, under our decisions, because it devised the title in fee simple to the trustees to be conveyed by them to the beneficiaries. Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 100, 84 Am. St. Rep. 70; Estate of Sanford, 136 Cal. 97, 68 Pac. 494; Estate of Pichoir, 139 Cal. 682, 73 Pac. 606. According to the terms of this attempted trust, the property was to be held by the trustees during the lives of the wife and children in esse at the date of his death, and the survivor of them, and, if at the death of each survivor there should be in esse any lawful issue of any child, the trust was to continue for the further definite period of 30 years, provided any of such issue shall live so long, and if not then for such lesser term as the survivor of such issue shall live, and at the expiration of the trust the property was to be conveyed by the trustees to the surviving lawful issue of the children. The will of deceased was admitted to probate in the territory of Hawaii on June 26, 1900, and an authenticated copy thereof was on July 27, 1900, admitted to probate in the superior court of Santa Clara county. On December 20, 1901, the surviving wife was appointed and qualified as administratrix with the will annexed in said superior court. Thereafter she and the other defendants conspired and colluded together to prevent a distribution of the real property under the laws of this

state, under which, the trust being void, the property would be distributed to the heirs at law (one-third to the surviving wife and one-sixth to each of the children), and to have the title thereto placed in the name of the trustees and the property retained by such trustees under such void trust. The plan adopted and carried into execution was as follows: The administratrix petitioned the superior court of Santa Clara county for an order of sale of said property, and the furnishings of the hotel thereon, on the ground that it was for the advantage, benefit, and best interest of the estate that a sale be made so that the proceeds could be invested in the territory of Hawaii, under the personal control and management of the persons interested in the estate. An order for the sale of all such property was procured from the court on this petition. The administratrix procured from defendant Alice K. Campbell a nominal bid for the property in the sum of $166,250. She then made a return of sale to the superior court, in which she represented that she had sold the property under the order of sale to said Alice K. Campbell for $166,250. On this an order was obtained on February 9, 1903, confirming the purported sale, and ordering a conveyance to the purchaser. On February 10, 1903, the administratrix executed a deed of the property to said Alice K. Campbell for a purported consideration of $166,250, which deed was at once recorded. Said Alice K. Campbell had no means wherewith to make the purchase, and, in fact, paid no consideration for the property. The administratrix thereupon, on February 20, 1903, procured a nominal decree of distribution of the $166,250, which she had never received, and certain other moneys in her hands, to the defendant trustees, and procured a purported receipt for the same from the trustees, although they never received any portion of the $166,250. Alice K. Campbell, the purported grantee in said probate sale, in further execution of the plan, then conveyed the St. James Hotel property to the defendant trustees, and they have ever since been in possession and control of

the property. Ever since the death of deceased, the plaintiffs have been residents of the territory of Hawaii, and were wholly in ignorance of their rights in respect to the St. James Hotel property, and of the facts constituting the fraud upon them until after it was too late to obtain any adequate relief in the matter of the estate of said deceased. The defendants, well knowing the rights of plaintiffs in regard to the property, concealed the same from them, and also concealed from them the acts and facts complained of. The date of the commencement of this action does not appear in the record, but it does appear that the amended complaint was filed November 17, 1903.

Complaint is made that some of the allegations of the amended complaint are based on information and belief. These allegations are, however, as to matters which are peculiarly within the knowledge of defendants, and as to which the plaintiffs could learn only from statements made to them by others. There can be no question that such allegations may properly be based on information and belief. See McDermont v. Anaheim, etc., Co., 124 Cal. 115, 56 Pac. 779. Therefore, they must here be taken equally with the positive allegations as stating facts confessed by the defendants. We are not advised of the particular reason upon which the learned judge of the trial court based his conclusion that the facts stated were not sufficient to establish a cause of action in plaintiff. It appears very clear to us that a complete case is thereby made for the interposition of a court of equity. It is the universally accepted rule that the title and disposition of real estate is governed by the lex loci rei sitæ. This necessarily includes the proposition that the validity of a trust in real estate attempted to be created by a will must be determined by the law of the situs of the real estate. See Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. This is apparently conceded by counsel for defendants. In the absence of a direction by the testator for the sale of the property, we are not concerned

here with the doctrine of equitable conversion. Estate of Walkerly, 108 Cal. 652, 41 Pac. 772, 49 Am. St. Rep. 97. The trust here, therefore, was void as to the real property of deceased situated within the state of California. It follows that as to such property the deceased died intestate, and the same descended by succession to his heirs at law (Est. of Walkerly, 108 Cal. 627, 652, 660, 41 Pac. 772, 49 Am. St. Rep. 97), one-third to his surviving wife, and one-sixth to each of his four children (subdivision 1, §1386, Civ. Code), subject only to proper administration of his estate.

In the face of these facts, it is idle to assert that no injury resulted to plaintiffs, three of these children, from the acts of defendants. By those acts the property to which they had succeeded under the laws of this state was irrevocably taken from them without consideration under color of valid probate proceedings, and placed in the name and possession of the trustees under the void trust. It is no answer to this to say that the deceased intended that they should not have this property, and that the acts of the defendants simply result in accomplishing the intent of deceased as expressed in his will. We have already seen that, as to this property, the expressed intent of the deceased was ineffectual for any purpose and the deceased died intestate. "A testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property." In re Walkerly, 108 Cal. 652, 41 Pac. 772, 49 Am. St. Rep. 97. It might as well be argued that, if a person had indicated an intention as to a disposition of his property to the exclusion of an heir at law by a writing not executed in accordance with the laws of this state and, therefore, absolutely void as a will, no injury would result to such heir from the concocting of a forged will expressing this intention, the probate thereof, and the distribution of the property of the deceased thereunder. Whatever other objection may reasonably be made to this action, certainly that of want

of injury to the plaintiffs is not worthy of serious consideration.

That the acts of the defendants constituted a fraud upon plaintiffs, as well as upon the court, appears to be too clear for question. All the proceedings in the superior court of Santa Clara county, from the petition for the order of sale to and including the decree of distribution of the proceeds of sale, were a mere sham, a scheme devised and carried into effect by defendants to remove the property from administration under color of proceedings for the sale thereof in the manner and for the purposes authorized by our probate law, and to thus accomplish a practical distribution thereof to the trustees under the void trust. There was, in fact, no necessity for any sale of the property, no intention to sell, no sale, no proceeds of sale to be distributed or delivered to the trustees named as distributees in the purported decree. It was all a fraudulent imposition upon the jurisdiction of the superior court, an attempt by concealing the real facts of the transaction from the court to use that jurisdiction for the purpose of depriving plaintiffs without consideration of the property to which they had succeeded under our law—a mere cloak to cover what was, in fact, simply the bodily taking of plaintiff's property without consideration and without any authority of law.

Defendants' counsel do not appear to seriously dispute that such acts would constitute a fraud, but they urge that inquiry in regard thereto be barred by the orders of the superior court authorizing the purported sale, confirming the purported sale, and distributing the purported proceeds. The jurisdiction of the courts of equity to afford appropriate relief from judgments generally, and from such orders and decrees in probate proceedings as are here involved, when obtained by certain kinds of fraud, is too well established to be questioned. See Bacon v. Bacon, 89 Pac. 317, and cases there cited. Where the judgment or order assailed is of such a character that a court of equity may not properly set it aside, it may never-

theless prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party. This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists. The contention that a proceeding of the kind before us constitutes a collateral attack on the probate orders is not well founded. It is a direct attack. Bacon v. Bacon, supra; Bergin v. Haight, 99 Cal. 52, 33 Pac. 760. In view of what has been said, it is apparent that, even if it be assumed that the order distributing the purported proceeds was an adjudication by the superior court of the validity of the trust which is not collaterally assailable (Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Matter of Trust of Trescony, 119 Cal. 568, 51 Pac. 951), such adjudication will not bar this proceeding if it was obtained by fraud of such a character as will warrant the exercise of the well-settled equitable jurisdiction.

It is true, as urged by counsel for respondents, that a court of equity is not authorized to relieve a party from the effect of a judgment or order of a court having jurisdiction to render the judgment or make the order on the grounds that the same was obtained by fraud, unless the fraud be, as was said in Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, "extrinsic or collateral to the questions examined and determined" in the proceeding resulting in the judgment or order. That was a case where it was sought to annul a decree in another action between the same parties upon the ground that the prevailing party therein had obtained the decree by the introduction of evidence which he knew to be false and the giving of which he had accomplished by bribing the witness. It was held, in accordance with the views expressed in United States v. Throckmorton,

98 U. S. 65, 25 L. Ed. 93, that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. It was said in that case: "The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy."

The fraud here alleged, however, was extrinsic or collateral, within the meaning of the rule. We are not confronted with a case where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented and determined, which is perhaps the most common instance of what is held to be extrinsic fraud. See Bacon v. Bacon, supra; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43. The extrinsic character of the fraud is even clearer here than in such a case. The complaint is that the former proceedings were wholly sham, a mere fraudulent contrivance designed solely to give the appearance of legality and protection against attack to what was, in fact, nothing but the taking of plaintiffs' property without consideration and without any authority of law, and that they were carried through by means of false representation to and concealments from the court as to the real facts and purposes of the transaction. Such an imposition upon the jurisdiction of the court, to the injury of the absent property owners, from whom the nature of the transaction was concealed and who were wholly in ignorance thereof, and could have learned concerning the same from any-

thing appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate and the preservation of the property for legal distribution (Bergin v. Haight, supra), and who was, moreover, as the natural guardian of two of the owners, under obligation to protect their rights (Sohler v. Sohler, supra), clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief. See Bergin v. Haight, supra; Tillman v. Thomas, 87 Ala. 321, 6 South. 151, 13 Am. St. Rep. 42; Fisher v. Wood, 65 Tex. 199; McCampbell v. Durst, 73 Tex. 410, 11 S. W. 380; Lawson v. Acton, 57 N. J. Eq. 107, 40 Atl. 584; Hoffman v. Wheelock, 62 Wis. 436, 22 N. W. 713, 716; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Wickersham v. Comerford, 96 Cal. 433; Curtis v. Schell, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107; Anderson v. Bank of Lassen Co., 140 Cal. 695, 74 Pac. 287. See, also, Sohler v. Sohler, supra; Aldrich v. Barton, supra. No case cited by counsel for defendants sustains their claim to the contrary.

There is no other point made in support of the ruling of the trial court that requires notice here. The allegations of plaintiffs were sufficient, in our judgment, to show a cause of action.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: Shaw, J.; Sloss, J.

In re Walkerly's Estate.

(No. 15,592.)

(Supreme Court of California. Sept. 3, 1895.)

(108 Cal. 627.)

Bequests—Conditions as to Time of Payment—Perpetuities — Assigning Homestead — Wills—Construction—Estoppel—Parol Evidence.

1. A direct bequest to a person, conditioned, however, that the principal thereof should not be paid till distribution of the residue by trustees, which was not to be till after the death of such person, is a present gift vesting immediately, and is independent of the trust, except as to the time of payment, which, being repugnant to the gift, as impossible on its face, is void.

2. A devise of the residue of an estate to trustees to hold and manage for a fixed period, and then sell and distribute among certain persons or their heirs, is void as creating a perpetuity; Civ. Code, §715, providing that the absolute power of alienation shall not be suspended by any condition or limitation longer than during the continuance of lives in being at the creation of the limitation or condition, and section 716 declaring void every future interest which, by any possibility, may suspend such power of alienation for a longer period, and declaring that it is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

3. Even though the future interest of the beneficiary be vested like a remainder, and be thus alienable, it is not such an interest as will by transfer carry an absolute interest in possession.

4. The provision in a devise in trust that the trustee shall sell the property, and distribute it among certain persons or their heirs only after the lapse of 25 years, cannot be rejected as a condition void because repugnant to the interest conveyed.

5. Even if the rule against perpetuities did not apply to personal property, the doctrine of equitable conversion could not be invoked, so that land devised in trust to be sold only after a fixed period should be treated as already sold and converted into personalty.

6. The word "heirs," in Code Civ. Proc., §1468, declaring that, if the property assigned as a homestead be selected from the separate property of deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of deceased, subject to such order, cannot be constructed to mean "heirs or devisees."

7. Though a devise in trust allows the trustees to sell the property at any time, still, it being provided that the trustees shall hold and invest the proceeds till distribution, which is not to be made till a definite time, a perpetuity is created; Civ. Code, §771, declaring that the suspension of all power to alienate the subject of a trust other than power to exchange it for other property, to be held on the same trust, or to sell it, and reinvest the proceeds, to be held on the same trust, is a suspension of the power of alienation, within the inhibition of section 715.

8. The inhibition of Civ. Code, §715, against suspension of the absolute power of alienation, applies to personal as well as real property, the section being in that part of the Code dealing with the modifications of ownership and restraints on alienation of "property in general."

9. Though a legatee, by taking under a will, is estopped to deny its validity as a will, she may insist on a due interpretation of its provisions disconnected with the bequest, though they create a trust void as against the statute as to perpetuities.

10. A court whose duty it is, on distribution of a testator's estate, to give effect to his legal devises and be-

quests, cannot, even with the consent of the parties, declare valid trusts which are opposed to the express provision of the statute against perpetuities.

11. Where the provisions of a will are plain and unambiguous, parol evidence is not admissible on the question of testator's intent.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution, testator's widow and minor child appeal. Reversed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

HENSHAW, J. William Walkerly died testate upon September 16, 1887, leaving as heirs at law his widow, Blanche M. Walkerly, and a posthumous child, born February 14, 1888. This appeal is by the widow and the minor child from the decree of distribution rendered in the matter of his estate.

Upon June 2, 1887, Walkerly executed his will containing the following provisions: "First. I declare that my entire estate is my separate property, having been acquired by me prior to my marriage. Second. I direct my executors hereinafter named to pay all my just debts and funeral expenses without unnecessary delay. Third. I give, bequeath, and devise to my dear wife, Blanche M. Walkerly, all my household furniture, books, pictures, jewelry, and plate, to her sole use and benefit forever. I also give and bequeath to her during her widowhood the free use and enjoyment of my residence consisting of block number 121, with dwelling, stable, etc., thereon, situated in the city of Oakland. Upon the death or second marriage of my said wife, my trustees herein named are hereby directed to take possession and control of said dwelling and premises, and to manage and administer

the same in the same manner and for the same purposes as they are directed in this will to manage and administer other property herein bequeathed and devised to them. Fourth. I hereby give and bequeath unto my dear wife, Blanche M. Walkerly, an annuity of two thousand four hundred ($2,400) dollars during her life, payable quarter-yearly, in gold coin of the United States, and I do hereby make the said annuity a charge and burden upon that certain piece of real estate situate on the northwest corner of Post and Stockton streets, in the city and county of San Francisco, known as the Walkerly Block or Building; and I do request my trustees hereinafter named to see that this annuity or allowance for the support and maintenance of my wife is promptly paid as herein directed. Fifth. I give and bequeath unto my grandnephew, Andrew Rumgay, the sum of two thousand dollars. Sixth. I do hereby give, bequeath, and devise unto Martin Bacon, Frank Barker, and Columbus Bartlett all the rest and residue of my estate of every description and wheresoever situated, in trust, for the following uses and purposes, to wit: (1) To take the possession, and charge, and management of the property, and collect the rents, issues, and profits thereof. (2) Out of the income or rents and profits to pay quarter-yearly the annuity or allowance hereinbefore made to my wife, Blanche M. Walkerly, for her support and maintenance. (3) To pay to my sister, Mary Windley, the sum of five hundred dollars per annum, during her life, payable semiannually. Should my sister die before her husband, then, and in such case, the annuity left shall not cease and determine, but shall go on, and shall be paid to Stephen Windley during his lifetime. (4) To annually distribute the residue of the rents and profits of the trust estate, after deducting the sum of $2,400 to be paid to my wife, and the $500 to be paid to my sister, Mary, or her husband, and the taxes, insurance, and expenses, and charges of administration, equally among my nephews and nieces. Upon the death of any nephew or

niece, his or her share shall go and be divided equally between his or her children, share and share alike. (5) To sell and convey all the trust property and estate at the expiration of twenty-five years from the date of my death, and to distribute the proceeds equally among my nephews and nieces or their heirs, the descendants or heirs of any deceased nephew or niece taking collectively the share which their father or mother would take were he or she living. Provided, that no final sale or distribution of the trust estate be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death. Upon the distribution of the proceeds of the sale of the trust estate among the parties entitled, then this trust shall cease and determine. Should any one or more of my said trustees die or resign, the remaining trustees or trustee must immediately appoint some suitable person to fill the vacancy, so as to keep the number of trustees at three. Seventh. I hereby nominate and appoint my nephews Martin Bacon and Frank Barker and my friend Columbus Bartlett the executors of this my last will and testament, without bonds, with full power and authority to sell any part of my estate, real or personal, whenever, in their judgment, or that of a majority of them, it is necessary or advisable to do so, excepting my residence in the city of Oakland, and the Walkerly Building in San Francisco. In the event that the proceeds of the sales of my other property shall not prove sufficient to pay my debts, expenses of administration, etc., then, in such case, but not otherwise, I hereby authorize my executors to negotiate, execute, and place a mortgage on the Walkerly Building, for the purpose of raising sufficient funds to pay the residue of my debts, etc. It is my will that the Walkerly Block be transferred and delivered over to my trustees hereinbefore named so soon as can be conveniently done after my death, to be managed by them in pursuance of the trust hereinbefore created, and that my residence be not sold while occu-

pied by my widow. Should she marry again, then my trustees are directed to take possession of the same, and manage it for the benefit and as part of the trust estate, with power to sell the same whenever in their judgment it is best to do so."

Upon September 7, 1887, he republished said will with the following codicil thereto: "I, William Walkerly, of the city of Oakland, Alameda county, California, do make, publish, and declare this as and for a codicil to my last will and testament. That is to say, being informed by my wife, Blanche Walkerly, that she is pregnant with a child by me, I desire to make provision for such child, should it be born alive, and to make a more liberal and different provision for my said wife than I have made in my will to which this is a codicil. First. I hereby revoke the gifts, bequests, and devises made in my said will to and for the benefit of my wife, Blanche Walkerly, and in lieu thereof I do hereby give and bequeath to her the sum of one hundred thousand dollars ($100,000), to be paid to her when the Walkerly Block shall be sold, as described and provided for in my will, and in the meantime to be a lien, mortgage, and burthen upon said Walkerly Block, bearing interest at the rate of five per cent. per annum. Said interest to be paid to her semiannually by my trustees, Martin Bacon and Columbus Bartlett. Second. I give, bequeath and devise unto my child, which shall be born unto me lawfully, begotten upon the body of my wife, Blanche Walkerly, the sum of one hundred thousand dollars ($100,000), to be paid when the Walkerly Block shall be sold as described and provided for in my will, and in the meantime to be a lien, mortgage, and burthen on said Walkerly Block, bearing interest at the rate of five per cent. per annum. And my trustees, Martin Bacon and Columbus Bartlett, are hereby directed to pay the interest on this bequest semiannually to the guardian of such child. Third. I hereby nominate and appoint my nephew Martin Bacon the guardian of the estate of any child which shall lawfully be born to me, without bonds."

Upon the hearing of the petition for distribution the court, first making certain findings of fact, hereinafter considered, rendered its decree, which itself contained a recital of the findings of fact above adverted to, and which, after further specifically setting forth the proceedings in probate showing that the estate was ready for distribution, and that the widow had remarried, and was the wife of William F. Burbank, made distribution as follows: "It is hereby ordered, adjudged, and decreed that the residue of said estate of William Walkerly, deceased, hereinafter particularly described, and now remaining in the hands of said executors, and any other property now known or which may hereafter be discovered which may belong to said estate, or in which the said deceased may have any interest, be, and the same is hereby, distributed unto Martin Bacon, Frank Barker, and Henry Davis Hawks, in trust, for the following purposes and uses, to wit: First. To take the possession, charge, and management thereof, and to collect the rents, issues, and profits thereof. Second. Out of the income or rents or profits of said trust estate to pay semiannually $2,500 to Blanche Walkerly-Burbank, formerly Blanche M. Walkerly, and $2,500 to William Martin Walkerly, a minor, and to distribute annually the residue of the rents and profits of said trust estate, after the aforesaid payments and expenses of the trust property have been paid, equally among the nephews and nieces of said William Walkerly, deceased; and upon the death of any nephew or niece his or her share to be divided equally between his or her child or children, share and share alike. Third. To sell and convey all the trust property and estate as soon as practicable, and convert the same into money, and distribute the same as follows: (1) Out of the proceeds obtained from the sale of the Walkerly Block in San Francisco, hereinafter mentioned, $100,000 to Blanche Walkerly-Burbank, with interest thereon from the 27th day of November, 1893, at the rate of five per cent. per annum, payable semiannually. (2) Out of the proceeds

obtained from the sale of the Walkerly Block in San Francisco, $100,000 to said William Martin Walkerly, a minor, with interest thereon from the 27th day of November, 1893, and after deducting therefrom said sum of $2,000 paid as attorney's fees to Arthur Rodgers, the attorney of said minor, appointed heretofore by this court, and interest as stated in the decree. (3) The remainder of the proceeds of the sale of said Walkerly Block in San Francisco, and all other property of said estate, to be equally divided among the following named persons. * * *." The nephews and nieces and the children of deceased nephews and nieces are then named, and their respective shares allotted to them. The residue so distributed to the trustees comprised the Walkerly Block, block 121 in Oakland, which had been set apart to Blanche Walkerly and the child as a homestead during her widowhood and personal property, consisting of moneys to the amount of $4,615, and certain stocks, judgments, and claims of considerable amount, but small actual value.

The first proposition urged by appellants against the decree may be thus stated: The decree declares trusts other and different from those set up by testator in his will. The trusts sought to be established by testator in his will are void. The trust declared by the decree, read by itself and apart from the will, whose provisions it is supposed to formulate, is legal, and requires no independent consideration. But does it fairly interpret and represent the trusts sought to be created by the will? This vital point must first receive attention. Omitting from present consideration the language of the codicil, Walkerly bequeathed and devised the residue of his estate to the trustees named upon certain defined trusts: (1) To pay an annuity of $2,400 to his widow during her life, making the annuity a charge upon the Walkerly Block; (2) to pay an annuity of $500 a year to his sister during her life, and upon her death to her husband during his life; (3) annually to distribute the remainder of the net income and profits of the estate to testator's nephews and nieces, and upon the death of any nephew or niece to

distribute his or her share among the children of such decedent. The trusts so declared belong to those classes of express trusts which, as to real property, are alone permitted to be created by our statutes. Civ. Code, §857, subds. 2, 3. So far, then, as concerns their objects and purposes, up to this point they contravene no law, and are undoubtedly legal. But there is still to be considered the life of the trust,—the event upon the happening of which, or the time upon the arrival of which, the testator has declared it shall cease and determine. These provisions are found in section 5 and 7 of the will above quoted. At the expiration of 25 years from the date of testator's death the trustees are required to sell all the trust property, and to divide the proceeds among the then living nephews and nieces or their heirs, the "descendants or heirs" of a deceased nephew or niece taking collectively the share of the ancestor. That there may be no room for construction of his meaning as to when the sale shall be made, the testator further declares in the same connection that "no final sale or distribution of the trust estate shall be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death." This language is certain, precise, and free from doubt. The testator had left as a legacy to his wife an annuity of $2,400, the payment of which was made a charge upon the most valuable portion of his estate, the Walkerly Block. His special purpose was to preserve this property unaliened and inalienable for at least 25 years; for a longer period if his wife should live longer, but, if she should die sooner, still for 25 years. This purpose is made manifest not only from the clauses of the trust already discussed, but, in addition, by the exemption of this property from the operation of the power of sale conferred in the seventh paragraph of the will. To the grant of power to sell, therein made, is expressly attached a reservation excepting this property.

Turning now to the codicil, which is to be construed

with the main instrument, it will be seen that the testator's declared purpose therein is to make a more liberal provision for his widow and for the child with which he has been informed she is pregnant. This he does by revoking the annuity, and giving her a present legacy of $100,000, with payment only deferred. It is to be paid "when the Walkerly Block shall be sold as described and provided for in my will," and in the meantime to be a charge upon that property. There is here not only no modification of the original time of the sale of this land and the extinguishment of the trust, but the provisions of the will in this regard are referred to with particularity as fixing the time of payment. The circumstance that the time of payment thus fixed must be after the death of the widow, and that, therefore, the legacy could not be paid to her, cannot affect or modify the terms of trust. The legacy is put wholly without, and made entirely independent of, the trust, except as to the date of payment. It is a present gift, vesting immediately, and, if the condition deferring the time of its payment is repugnant to it as being impossible upon its face, the condition would be void. Hone's Ex'rs v. Van Schaick, 20 Wend. 568; Oxley v. Lane, 35 N. Y. 350. In passing may be pointed out the radical and important distinction between the present gift to the wife and child each of $100,000 to be paid when the Walkerly Block is sold, and the future interests of the nephews and nieces, to whom nothing was directly given. All of the residue was devised to the trustees, who were to sell as provided, and upon sale to distribute the proceeds to the nephews and nieces who should be then alive, and the "descendants or heirs" of those who might be dead. The legacy to the child presents no features meriting special attention. No other conclusion, therefore, can be reached than that the general purpose of the testator as to all his property, clearly expressed by his will, was that it should be held by the trustees for 25 years before distribution, and that his special purpose as to that particular property called the "Walkerly Block"

was that in no event should it be sold or aliened before the expiration of 25 years from his death.

But the trust estate consisted (1) of the Walkerly Block; (2) of the homestead, block 121, in Oakland; and (3) of personal property; and, as the terms and conditions of the trusts are not uniform as to these, a separate and more particular consideration of them and of the law bearing upon them becomes necessary. We proceed to consider:

1. The trust declared upon the Walkerly Block. This property comprises by far the greater portion in value of the testator's estate. It was devised to the trustees upon the trusts indicated, namely, to manage the property, and apply the proceeds for the use of the persons designated, and at the expiration of 25 years, or, if the widow should at that time be alive, then upon her death, to sell the property, and distribute the proceeds among the then living nephews and nieces and the "descendants or heirs" of those who might be dead. The purposes indicated come within the purview of subdivisions 1 and 3 of section 857 of the Civil Code. The fatal defect in the trust is that it provides for an absolute period of years for its determination, during which period the power of alienation is suspended. Section 715, Civ. Code: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition." Section 716, Id.: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." Section 749, Id.: "The delivery of the grant, where a limitation, condition or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, con-

dition or interest, within the meaning of this part of the Code." Section 771, Id.: "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and re-invest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715." It would seem as though all need of discussion were foreclosed as to the trust under consideration by the plain terms of the Code above set forth, yet, because of the great value of the property involved, and the serious consequences which must follow to the interests of respondents, it would perhaps be unjust to leave this consideration without further amplification. We will, therefore, discuss, so far as we have been able to follow them, the propositions made by respondents in support of this trust. A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee. Chapl. Suspen. §64. The law against the suspension of the power of alienation applies to every kind of conveyance and devise. It applies to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or, as here, merely restraining the power of alienation for a fixed period of years, and then providing for sale with gift over. In short, it "covers the entire field of estates, interests, rights, and possibilities." Id. §2. Says Perry: "A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate." Perry, Trusts, §382. And section 771, Civ. Code, is but an enactment of this rule. Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. Section 863, Id. If this trust be not valid in its creation, the trustees would

take no estate, but neither would the beneficiaries whose rights are dependent upon the validity of the trust. If it be valid, then the "whole estate" vests in the trustees. The "whole estate," as has been pointed out (Embury v. Sheldon, 68 N. Y. 227), means the whole of such an estate as is necessary to the performance of the trust. In the one under consideration it embraces the whole legal and equitable estate which the testator enjoyed, since no less would be sufficient to enable the trustees to carry out the purposes: first, to apply the income for 25 years (Civ. Code, §857, subd. 3); and, second, at the expiration of that time to sell the property, and dispose of the proceeds (Id. subd. 1). The beneficiaries herein, then, take no estate as such, their interest being the right to the enforcement of the trust.

But, if we understand the position of respondents, it is contended that the nephews and nieces take a future estate, which future estate is vested and is alienable, and that, therefore, it is a valid estate, since only those future interests are void which by possibility may unduly suspend the power of alienation. Following this argument, and for this purpose treating the interest of the beneficiaries as a future interest or estate within the contemplation of the Code (Civ. Code, §716), it may be first suggested that all expectant estates, whether vested in interest or contingent with a vested right, or entirely contingent, pass by succession, will, and transfer like present estates and interests (Id. §699). But the fact that such interests may pass does not relieve from the operation of the rule, unless there are persons in being who, by combining and conveying all their distinct interests created by the original grant or devise, can pass an absolute interest in possession. Conceding that the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting, and that the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession. As is pointed out by the court in Vander-

poel v. Loew, 112 N. Y. 167, 19 N. E. 481, the vesting of an estate involves absolute alienability only so far as that particular estate is concerned. The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned; but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest in possession, the beneficiaries would be compelled to unite with their conveyance that of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of 25 years. An attempt by them to convey before that time would contravene the trust, and be a void act (Civ. Code, §870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted. So, even though the beneficiary should be a remainderman under such a trust as this, he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries, Douglas v. Cruger, 80 N. Y. 15; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. Hence the question whether the interest of the beneficiaries is contingent or vested is here of no possible moment. The absolute alienability required by section 715 of the Civil Code does not imply vesting, and it affords no escape from the operation of the rule because the interest which the beneficiaries take may be relieved from uncertainty as to persons or event. When so relieved, the interest may be said to be vested. But it is not such a vesting, nor yet such an interest, as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee so long as the terms of the trust from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations, or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law.

Nor is the 25 years a "condition" which may be rejected as void, because repugnant to the interest conveyed. It is a limitation, a restraint upon alienation, forming an integral part of the trust. To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will in certain instances make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the trust itself must fail. Of the express trusts permitted by the statute there are two great classes, one of which does and the other does not involve a suspension of the power of alienation. Under the first class are included all those whose very purpose and essence it is that the land shall not be alienated by the trustee during the trust term, and where consequently, a sale by him would be in direct contravention of the trust. In the case of such express trusts as occasion the suspension of the absolute power of alienation, the term of duration is the vital subject of inquiry. Chapl. Suspen. 146, 148. Trusts such as those under consideration in their very nature operate to suspend the power of alienation. That power must be suspended in the one case while the trustee is distributing the rents and profits, and in the other case it is suspended by the express duty imposed upon the trustee to sell only at the expiration of a fixed period. The law has seen fit to insist that the measure of the period of suspension shall be lives in being, and it will not countenance the suspension for any fixed period or term of years for the sufficient reason that during the time of such a limitation, however short, the person capable of conveying the absolute interest might die,—a possibility not to be endured. So it happens that whenever a testator, through temerity or ignorance, violates the plain mandate of the statute, as in this case, and creates a trust by which the absolute power of alienation is sought to be suspended for a term of years, he must pay the penalty of his rashness or folly in the destruc-

tion of his cherished design. Such, though grievous, have always been the necessary and logical decisions of the courts, and the books abound in cases which, while monuments to the learning of the judges, are equally monuments to the persistency of testators, or to the recklessness of their advisers. Thus it is, as is said by the vice chancellor in Field v. Field, 4 Sandf. Ch. 528, that "the statute restricts the suspension of alienation and ownership to lives and lives only. It does not admit of a suspense for a term of years, however short, nor one dependent in part upon life and in part upon a fixed period of time." The rule has been applied in New York alone to terms of varying length of from 21 years to 3, from the leading case of Hone's Ex'rs v. Van Schaick, 20 Wend. 564, through a long and unvarying series of judicial determination (Bolles, Power Alien, note to section 78, where cases are collated), while in other states the authorities are as uniform, if not so numerous. Mandlebaum v. McDonell, 29 Mich. 78; Farrand v. Petit, 84 Mich. 671, 48 N. W. 156; DeWolf v. Lawson, 61 Wis. 473, 21 N. W. 615; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

Nor can the doctrine of equitable conversion be invoked to aid this trust. If we understand the argument of counsel upon this point, they urge that under that doctrine the land should be treated as now sold and converted into personal property, and that such a trust in personal property would be valid, and that, therefore, this trust must be upheld. This would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction. The rule of equitable conversion merely amounts to this: that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done will for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not.

But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate. Savage v. Burnham, 17 N. Y., 561; Vincent v. Newhouse, 83 N. Y. 505; Underwood v. Curtis, 127 N. Y. 533, 28 N. E. 585; DeWolf v. Lawson, 61 Wis. 469, 21 N. W. 615. Whether a trust of personalty for a fixed term would be valid is a matter of consideration hereinafter.

The intestacy of the testator as to the Walkerly Block is the harsh result which must follow this void trust, and the property will descend to his heirs. It is true that such was not the testator's intent, but a testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property. Habergham v. Vincent, 2 Ves. Jr., 204; Hawley v. James, 16 Wend. 150; Haynes v. Sherman, 117 N. Y. 433, 22 N. E. 938.

2. The trust as to block 121. The first objection presented by the appellants to the disposition of this land made in the decree is that it has been removed from administration, and no longer forms a part of the residue of the estate or of the trust property. The argument in support of the contention is based upon the following facts: Upon application the court set apart block 121 as a homestead to the widow and minor child "during her widowhood." This life estate was terminated by her marriage to William F. Burbank, whose wife she now is. Section 1468, Code Civ. Proc., declares that if the property assigned as a homestead be selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. The claim of the widow, therefore, is that the title to block 121, notwithstanding the testamentary disposition made of the property to the trustees, vested in herself and child, by virtue of this section, eo instanti, when the court made the homestead order, and that con-

sequently her subsequent marriage, while it terminated the homestead right, had no effect upon the title to the property which had vested in her as an heir of her husband. Against this respondents urge that the word "heirs" was not used in the section to exclude devisees, and that it should be construed as broad enough to include them. The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely. But still it is unquestionably the general policy of our law to allow full power of testamentary disposition, saving as that power may be abridged by specific enactments. The Code provisions making disposition of the homestead and of estates in value less than $1,500 are instances of the limitations put by the legislature upon the free power of testamentary disposition, and from the lack of uniformity and harmony in their terms these homestead provisions have presented questions of much doubt and vexation to the courts. The present question is one of that kind. Did the legislature mean by section 1468 to do more than declare the ordinary rule of succession and descent in cases of intestacy, but subject always to the right of testamentary disposition; or did it mean that, as to separate property, upon which the homestead character had been impressed by order of court any devise would be void, and the property must descend to the heirs? The latter view places a limitation upon a testator's power, and removes from the disposition of a will any property which may chance to be selected and set apart to the widow and children, and may thus defeat by a curious uncertainty the object of a testator's worthy bounty. It may do more than that, as in this case. The widow, to whom a homestead of the estimated value of $30,000 had been set aside "during her widowhood,"—the time in contemplation of a beneficent law during which she may be dependent and is entitled to maintenance from the estate of her deceased husband,—by marrying again, while thus cutting off any further right of homestead or maintenance, is enabled to

obtain a perfect and untrammeled fee in the property which her husband had devised to others, and which, in the general contemplation of the law, was to be set aside to her use only during the limited period of her widowhood and dependency. But nevertheless such an interpretation is borne out by the language of the statute. Upon the other hand, the former view is certainly more in accord with the apparent policy of the law; but the language of the section before and after amendment to its present form stands in the way of its adoption. Where a homestead has been selected from the separate property of a husband during his life, and without his consent, it goes upon his death, to his "heirs and devisees," subject to the power of the court to assign the same for a limited period, under section 1265 of the Civil Code; while by section 1474 of the Code of Civil Procedure the same property vests in "the heirs," subject to the same power of limited assignment in the court. It is not easy to see, as this court has before said, why the rule of devise or descent as to a homestead upon separate property declared during life should differ from that which obtains in case it be set apart after death, and it is still less easy to perceive why the two sections last above cited should be left inharmonious; but nevertheless, if the legislature has seen fit to prescribe different rules, it is the bounden duty of the court to give them effect. This the court was reluctantly driven to do in Mawson v. Mawson, 50 Cal. 539. Section 1465, Code Civ. Proc., at that time provided that the homestead, on being set apart, should be the property of the surviving widow or husband, if there were no minor children. Mawson died intestate. There were no minor children. A homestead was set apart to the widow out of the separate property. The deceased left two children of a former marriage,—heirs at law,—and they appealed. This court adjudged that the title vested in the widow to the exclusion of the heirs at law. By the amendment to section 1465, adopted in 1880, the title under such circumstances is now declared

to vest in the heirs; and we cannot, without doing violence to the meaning of the word, hold that it includes devisees; nor can we, without doing equal violence to all rules of statutory construction, read into the section the words "or devisees." Code Civ. Proc. §1858. The section is plain and unambiguous. Its meaning is in no way uncertain, and, when that meaning is found, nothing is left but to declare it. The wisdom of the law is for the legislature alone. It is concluded, therefore, that the section is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will. Such being the case, the trust in block 121 fails for lack of subject-matter. But, were the other view to obtain, and the property to be considered a part of the trust, the position of respondents would not be bettered; for the trust as to this land differs from that of the Walkerly Block only in permitting a sale of the property before the expiration of the twenty-five years. In all other essential respects the trusts are the same. In the event of a sale, still the proceeds are to be held and invested until distribution, which, as in the case of the Walkerly Block, is deferred to a fixed time. The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law. Civ. Code, §§715, 771; Estate of Hinckley, 58 Cal. 457, 481; Hawley v. James, 16 Wend. 163; Haynes v. Sherman, 117 N. Y. 438, 22 N. E. 938. Nor is it the law of this state that the provisions against restraints upon alienation do not apply to trusts of personal property, as we will proceed to consider.

3. The trust in personal property. The essential difference in this state between trusts in real property known as "express trusts" and those in personal property are: First, the former can only be of the kinds permitted by the statute, and no others (Civ. Code, §857),

while the latter may be created generally for any purpose for which a contract may be made (Id. §2220); second, the former must be created and declared by writing (Id. §852), while the latter may rest upon parol (Id. §2222). But to all trusts, whether of real or personal property, the limitation upon the suspension of the power of alienation expressed in section 715, Civ. Code, directly applies. The section is found in division 2, pt. 1, tit. 2, of the Code, where the lawmakers are dealing, as expressly declared, with the modifications of ownership and restraints upon alienation of "property in general." Again, section 771, Civ. Code, shows plainly the applicability of the law to personal property; for if it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation under section 715, Id. And, finally, the applicability of section 715, to trusts in personal property has often been recognized, and never questioned. Estate of Hinckley, 58 Cal. 457; Goldtree v. Thompson, 79 Cal. 613, 22 Pac. 50; Williams v. Williams, 73 Cal. 99, 14 Pac. 394; Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636. We are not unmindful of the fact that the statutes of the state of New York in express terms put a limitation upon the power to suspend the ownership of personal property. 1 Rev. St. p. 773, §1. And we have not overlooked the circumstances that the supreme courts of Michigan and Wisconsin have uniformly held that their statutes, similar in terms to our Code provisions, do not apply to trusts in personal property. But it is to be observed that the legislature of this state, in adopting section 715 of the Civil Code, placed it where it must apply; and, therefore, made it apply to "property in general," while the corresponding section in the Michigan statutes (How. Ann. St. Mich. §5531) and that of the Wisconsin statutes (Rev. St. Wis. §2039), are found in the chapters of the law re-

lating to estates in real property, and so have been construed by the courts to be applicable only to trusts in such property. Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, and 50 N. W. 1103; Palms v. Palms, 68 Mich. 355, 36 N. W. 419; De Wolf v. Lawson, 61 Wis. 469, 21 N. W. 615. In those states it is held that, as to trusts in personal property, the common-law rule still obtains. And it is for the application of this rule that respondents here contend. But even this would not avail to save the trust. The common-law rule against perpetuities does not as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts, whether of realty or personalty, were all within its terms. I Jarm. Wills, c. 9; Lewis, Perp. 159; Perry, Trusts, §§377, 384; Lewis, Trusts, c. 7; Gray, Perp. §202; 4 Kent, Comm. 271; Cadell v. Palmer, 1 Clark & F. 372. As Jarman states: "To the test of the rule settled by Cadell v. Palmer, every gift of real or personal estate, by will or otherwise, must be brought." 1 Jarm. Wills, 217. By the Thelluson act (39 & 40 Geo. III, c. 98) the maximum period during which the power of alienation could be restrained was lives in being and 21 years and 9 months. Tested by that act, still would this trust be invalid. We hold, however, that section 715 of the Civil Code not only applies to trusts in personal property, but also that it shortens the period permitted by the common law to lives in being. Private trusts in personal property which suspend the power of alienation must be limited, like private trusts in realty, to lives in being; and the trusts here are consequently destroyed by the same vice which invalidated those first considered.

We have thus far construed the trusts without noticing some objections urged by respondents against the right of appellants to be heard. Of those the first is that appellants are estopped from attacking the validity of the trusts. No estoppel is found against the appellants, but the facts which were claimed to establish one are set

forth in the findings. Briefly, those facts are that the widow and child had been receiving a family allowance. By stipulation it was agreed that the order of family allowance should be vacated, and that the executors would thereafter pay the widow and child each $416.66⅔ per month, being at the rate of 5 per cent. per annum upon the legacies provided to be paid in the codicil to the will; and the amounts so paid should, upon distribution, be treated as payments of interest upon account of said legacies. The court made its order in accordance with the stipulation. No mention is here made of the trusts, and no waiver, express or implied, of the right to demand a legal interpretation of them could thus arise. The legacies, as has been pointed out, were not within the trusts, but were independent and valid bequests. The fact that under these circumstances the widow had elected to take under the will would have estopped her from denying the validity of the instrument as a will, but did not and could not operate to estop her from insisting upon a due interpretation of the instrument. Appellants still stand affirming the validity of the will as a will, but insist that the trial court has not correctly interpreted some of its provisions. It became the duty of the court for the first time upon distribution to give effect to the legal devises and bequests of the testator, and it could not, even with the consent of the parties, declare valid trusts such as these which are opposed to the express mandate and policy of the law.

It is next urged that, as the court made findings concerning the testator's intent, and decreed distribution in accordance with these findings, and as the findings are not attacked, and will sustain the decree, and as "a volume of extrinsic circumstances bearing on the question was introduced without objection," these appellants are not in a position to combat the decree. But as to this it need only be said that it is the duty of the court in all cases to ascertain the intent of the testator from the language of the will, and the occasions which render parol

evidence of circumstances admissible do not here arise. Civ. Code, §§1318, 1340. The terms of the will are plain and unambiguous. It may be said of all wills that the testator's intent is to make a valid disposition of his property, and as to most provisions which are deemed invalid there is no difficulty in arriving at his actual meaning and intent. But a court is not, therefore, authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court had he known his own attempt was invalid. So of the trusts decreed by the court it may be said, as was said in Coster v. Lorillard, 14 Wend. 349: "This would approximate nearer to the will of the testator than any other proposed alteration. But, after a diligent inquiry, I have not been able to satisfy myself that there is any principle or decision that would authorize such an interference. It would be arbitrary, and establish a precedent for courts, not to construe wills according to the intent of the testator as derived from a consideration of the language used to express it, but to make a will for him; such an one as we undertake to presume he would have made, if advised that his own was void as against law. This I cannot consent to do. Better that the intent of a testator should fail in a particular case than that the court should assume such arbitrary and undefined discretion over his estate. If we cannot execute the whole will, or some distinct and independent portion of it, the whole had better be declared void. The law makes a better one than will usually be made by the court." So, too, where the language of the provisions of a will is plain and unambiguous, the courts are not permitted to wrest it from its natural import in order to save it from condemnation. Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839.

The determination that the trusts are void renders unnecessary any consideration of the other points presented. The trusts being void, it follows as to the property at-

tempted to be devised in trust, that the testator died intestate. It, therefore, descends to the heirs living at the time of his death. For the foregoing reasons the decree is reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

IN RE WALKERLY'S ESTATE.

(No. 15,592.)

(Supreme Court of California. Sept. 3, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution certain of the beneficiaries appeal. Affirmed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. This is an appeal from the decree of distribution taken by some of the beneficiaries under the trusts seeking modification of the decree in certain minor particulars. The points raised are made of no moment by the decision of this court upon the appeal of the widow and child from the same decree (No. 15,592, filed Sept. 3, 1895, 41 Pac. 772). The modifications asked for are denied.

In re Walkerly's Estate. (S. F. 6.)

(Supreme Court of California. Sept. 3, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution certain of the beneficiaries appeal. Affirmed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

Per Curiam. This is an appeal by certain beneficiaries from the decree of distribution entered in the matter of said estate. The decision of this court in the appeal of the widow and child in the same matter (No. 15,592, filed Sept. 3, 1895, 41 Pac. 772), renders superfluous any consideration of the points here presented, saving that it may be said that it was the duty of the court in probate, upon distribution, to distribute under the will the residue of the estate to the trustees, upon the theory that the trusts were valid. This is what was done. But, the trust having been determined to be void, that attempted distribution was, of course, invalid. The motion to dismiss this appeal, while in point of fact perhaps meritorious, may be denied under the circumstances, without injury to the moving party. It is denied, and the proposition of appellant that the court had no power under the will (and assuming a valid trust) to distribute to the trustees is decided adversely to appellant's contention.

In re Walkerly's Estate. (S. F. 6.)

(Supreme Court of California. Sept. 5, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From orders, judgments, and decrees settling the final accounts of the executors certain beneficiaries appeal. Appeal dismissed.

Rodgers & Paterson, for appellant. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

Per Curiam. It appearing from the statement of counsel made in open court that his appeal upon behalf of certain beneficiaries from the order, judgment, and decree of the superior court made and given upon November 27, 1893, settling the final account of the executors of the will in the matter of the above-entitled estate, and his appeal from the order, judgment, and decree made and given by the superior court upon August 17, 1892, settling the final account of the executors of the will in the matter of the above-entitled estate, have been, and each of them is, abandoned, and no transcript upon these appeals, or either of them, having been filed as required by law and the rules of this court, it is ordered that said appeals be, and each of them is, hereby dismissed.

INDEX.

Page.

PURPOSES OF THE SUIT..... 2

CHRONOLOGICAL STATEMENT..... 4

QUESTIONS PRESENTED UPON DEMURRER TO THE BILL..... 6

QUESTION ONE..... 7

SUPERIOR COURT ACQUIRED JURISDICTION TO ADMINISTER THE ESTATE. THE FOURTEENTH AMENDMENT CANNOT BE INVOKED. 7

A. The laws of a State provide the rules which control the construction of wills and the transmission of estates..... 10

B. Jurisdiction to administer the estate was duly acquired.... 14

C. Jurisdiction to distribute the estate was properly exercised, and herein, what constitutes a proceeding *in rem*, and what constitutes due process of law..... 18

QUESTION TWO..... 37

A DECREE OF FINAL DISTRIBUTION IS CONCLUSIVE AS TO THE CONSTRUCTION OF THE WILL AND THE PERSONS ENTITLED TO THE ESTATE..... 37

A. The decree of distribution judicially construed the will, determined its beneficiaries, and is final..... 37

B. The decree is sufficient on its face, even if it fails to show that proof of notice was made..... 50

C. A failure of a decree to show that proof of notice was made does not render the decree void on its face..... 56

D. A judgment becomes effective upon its rendition, irrespective of the date of its entry..... 59

E. Recital that proof of notice has been made satisfies the statute; preservation of a record of the character of proof made is not required..... 64

F. The showing required by the statute, as to notice, is a mere recital, and not an adjudication..... 67

G. Absence from a decree of a recital showing due notice may be supplied at any time..... 68

H. The statute does not require a record of the proof of notice; a mere recital that proof was made will suffice..... 71

I. The provision in section 1638, C. C. P., for a recital and for its conclusiveness is of no essential efficacy to a decree otherwise regular..... 74

J. The decree is conclusive..... 77

Page.

QUESTION THREE 86
A. This is a collateral attack 86
B. The bill does not show extrinsic fraud 86

QUESTION FOUR 98
JURISDICTION OF THE FEDERAL COURT 98
POSITION OF DEFENDANTS JENNIE R. AND GEORGIE E. WILLIAMS. 111

QUESTION FIVE 112
A. Complainant is barred by the statute of limitations 112
B. It appears from the bill that complainant has been guilty of inexcusable laches 117

QUESTION SIX 163
DISCUSSION OF ITEM 4 OF THE WILL; THE TRUST CLAUSE THEREIN IS VALID 163
A. Item 4 must be construed as an administrative provision ... 169
B. Doctrine of merger applicable 178
C. Separability of invalid from valid trusts 181

THE BILL DOES NOT STATE FACTS SUFFICIENT TO ENTITLE COMPLAINANT TO RELIEF 193

COMPLAINANT'S AUTHORITIES DO NOT SUPPORT THE THEORY OF THE BILL 198
A. As to fraud 203
B. As to laches 211
C. As to complainant's right to rely upon Judge Williams 214
D. As to Judge Williams' statement being one of fact 219
E. As to Judge Williams occupying a fiduciary relation 221

CONCLUSION 223

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 120.

GEORGE G. GOODRICH, APPELLANT,

vs.

JOHN W. FERRIS, FRANK HANSFORD JOHNSON, ET AL., APPELLEES.

APPELLEES' BRIEF ON APPEAL.

Thomas H. Williams, a resident of San Francisco, California, died on February 28, 1886, leaving a large estate situated in that city and in various counties in that State, and a will, which, after certain bequests not involved in this controversy, vested his entire estate in a trustee, for the benefit of his children during their respective lives, and thereafter, as each child should die, its share in fee simple absolute to its heirs provided by the will. The complainant, a resident of New York, married the daughter of the testator, who received and accepted the benefits provided for her by the will until she died, on October 3, 1893. By the terms of that instrument the complainant is a stranger to the estate, and his wife's interest in its properties ended with her death.

The will was admitted to probate on April 6, 1886, and the estate administered, by the Superior Court of California,

in San Francisco, until it made its decree of final distribution on the 5th day of January, 1897. The complainant filed his bill on May 19, 1904, more than 18 years after the death and probate of the will of the testator, more than 11 years after his wife's death, and more than 7 years after the decree of final distribution was rendered. The jurisdiction of the lower court was invoked upon the ground of diverse citizenship, and upon the theory that a construction of the 14th Amendment of the Federal Constitution is involved.

The suit is in equity to obtain a decree of the Circuit Court of the United States, Ninth Circuit, Northern District of California, that:

(*a*) The decree of final distribution of the estate of Thomas H. Williams, deceased, entered on January 5, 1897, at the conclusion of the administration of said estate, by the Superior Court of San Francisco, State of California, was fraudulently obtained.

(*b*) That said Superior Court was without jurisdiction to render the decree.

(*c*) That by subdivision 4 of his will the absolute power of alienation of the property of the deceased was suspended for a term of three years, and not for a period measured by the continuance of lives in being; and that, as to the trust created by said will and included within or dependant upon said subdivision, the will is void, and to that extent the deceased died intestate.

(*d*) That the complainant is the surviving husband and heir-at-law of a deceased daughter and heir-at-law of said decedent, and is entitled to seven thirty-seconds of the real estate in the hands of the executor at the time of the death of his wife, which subsequently passed into the hands of the distributees.

(*e*) That the defendants be declared trustees for complainant of said share which came into their hands under said decree of final distribution, and that they make discovery of said estate and the avails thereof.

The bill of complaint shows that when distribution of the estate of General Thomas H. Williams was decreed twelve years ago, its real property, consisting of city lots in San Francisco, and many tens of thousands of acres of swamp and overflowed, reclaimed and unreclaimed land, was valued at $1,459,445.08.

The character of this property appears from the exhibit attached to the bill. Every parcel of city and every acre of outside lands stands clouded by this suit. Reclamation of swamp and overflowed land cannot be undertaken; development and improvement of reclaimed and partially reclaimed lands are checked; every dollar received, every penny expended, every proceeding had, every transaction to be had, every enterprise, past, present, and future, relating to the properties involved, is threatened by the complainant's claim of co-tenancy. The court will take judicial notice of the overwhelming disaster which visited California in 1906—of the earthquake and fire which destroyed a city and its public records, including those of its Superior courts, followed by floods which swept away the protecting levees and submerged the fertile lands along the San Joaquin River, and of the equally disastrous floods of the present year, and will at once observe the difficulties of reconstructing the city and of reclaiming the country properties, and that it is of the highest importance to our clients, as well as to the general public interest, that certainty and stability in the title to this estate shall be speedily assured, so that it may safely be improved and rendered as useful as possible.

For the convenience of the court in the consideration of the questions presented, the following chronological statement is submitted (as the statute of limitations and laches of the complainant are involved, the more important events relating to those questions are italicized):

CHRONOLOGICAL STATEMENT.

February 28, 1886. *Thomas H. Williams died,* leaving as heirs-at-law:
Sherrod Williams, son, adult;
Thomas H. Williams, Jr., son, adult;
Mary Bryant Johnson, daughter, married to Frank S. Johnson, adult;
Percy Williams, adult;
Bryant Williams, about 20 years old;

April 2, 1886. *Will of Thomas H. Williams admitted to probate by Superior Court of City and County of San Francisco, California;*

April 6, 1886. *George E. Williams appointed administrator, qualifies and takes possession of estate;*

August 1, 1888. Percy Williams marries Bessie;

August 2, 1888. Sherrod dies, leaving neither wife nor issue;

December 29, 1888. Mary Williams divorced from Frank S. Johnson;

March 11, 1889. Frank S. Johnson appointed guardian of Frank Hansford Johnson;

November 12, 1889. Child born to Percy and Bessie;

December 7, 1889. *Mary Bryant Johnson married to George G. Goodrich, the complainant;*

February 16, 1890. Child of Percy and Bessie dies;

October 3, 1890. Percy dies, without issue;

May 2, 1893. Bryant dies, leaving neither wife nor issue;

October 3, 1893. *Mary dies, leaving Goodrich, complainant, as surviving husband, and Frank Hansford Johnson (the issue of her marriage with Frank S. Johnson), as heirs-at-law;*

November, 1893. *The complainant has interview with George E. Williams, concerning estate.*

August 1, 1896. Frank Hansford Johnson, by his guardian, petitions Superior Court of Marin County, California, wherein the matter of the guardianship of his estate was pending, for authority to take certain proceedings in the Matter of the Estate of General Williams, in the Superior Court of San Francisco;

August 1, 1896. Order made authorizing the proceedings prayed for;

August 7, 1896. Thomas H. Williams, Jr., filed petition for appointment of appraisers in estate of General Williams;

August 12, 1896. George E. Williams, Frank S. Johnson, and Thomas H. Williams, Jr., appeared in court and consented to order appointing appraisers;

August 12, 1896. Order made appointing appraisers;

December 11, 1896. Order appointing appraisers and appraisement filed;

December 15, 1896. Thomas H. Williams, Jr., filed petition for final distribution of estate of General Williams;

December 15, 1896. *George E. Williams, as executor, filed his final account and petition for settlement thereof and for final distribution;*

December 15, 1896. *Notice of settlement of final accounts and hearing petition for final distribution posted in three public places;*

January 5, 1897. *Decree of final distribution entered;*

December 17, 1899. *George E. Williams died, leaving defendants Jennie R. and Georgie E. Williams his heirs-at-law;*

June, 1901. Thomas H. Williams, Jr., marries Beatrice;

February 14, 1903. Child born to Thomas H., Jr., and Beatrice, called Thomas H. Williams 2nd.

Six questions are presented, and arise upon demurrers to the bill of complaint as amended:

1. Did the Superior Court of San Francisco acquire jurisdiction to decree distribution, and herein of due process of law?

2. Is the decree of final distribution such a conclusive adjudication of the validity of the will, and of the rights of heirs, legatees and devisees, that it became absolute upon the expiration of the period limited for appeal?

3. Have the defendants been guilty of such fraud as will warrant a court of equity to set aside the decree of distribution, or to hold them as trustees for the complainant?

4. Has the Federal court any jurisdiction to construe, or to determine any question relating to the validity of the will of General Williams?

5. Is the complainant barred by the statute of limitations, or are his remedial rights lost by reason of his laches?

6. Does the will suspend the absolute power of alienation of the property of the estate for a fixed term, not measured by the continuance of lives in being, and create a trust estate void for that reason.

Question 1. Did the Superior Court acquire jurisdiction to decree Distribution?

THE SUPERIOR COURT OF SAN FRANCISCO, SITTING AS A PROBATE COURT, ACQUIRED COMPLETE JURISDICTION TO ADMINISTER THE ESTATE OF GENERAL WILLIAMS.

THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION CANNOT BE INVOKED IN CASES OF THIS CHARACTER.

It appears by the bill that the will and codicil were regularly admitted to probate in the Superior Court of the City and County of San Francisco, on the 6th day of April, 1886, and on the same day letters testamentary were ordered and issued by that court to George E. Williams, the executor and trustee named in the will, who duly qualified as executor, and took possession of the estate as executor and as testamentary trustee, and entered upon the execution of his trust, and carried on the business in which the deceased had been employed, as provided by the will, and continued to do so until the decree of final distribution of the estate was entered on the 5th day of January, 1897; and thereafter he continued in office as trustee of the life estate created by the will (of Thomas H. Williams, Jr., who was the only surviving child of the testator when final distribution was made), until his death on December 17th, 1899. Thereafter, under appropriate proceedings, the defendant, John W. Ferris, was made succeeding trustee of said life estate, and still continues in office as such.

It is thus shown by the bill that the Superior Court mentioned acquired and, for a period of nearly eleven years, exercised general jurisdiction over the estate.

It is also shown by the bill that the notice of the hearing of the final account of the executor and of the petitions for final distribution were given in the manner and posted for the length of time and in all respects as required by the statute of the State; but it is claimed that such notice, *in*

this case, violated the Fourteenth Amendment of the Constitution of the United States, because the complainant was a citizen of, and living in, the State of New York, and therefore the ten days' notice of the hearing given did not afford him any opportunity to appear and be heard, and so, it is asserted, he was deprived of his interest in the property of the estate without due process of law.

To sustain the title we will show that, upon principle and authority:

The construction, force, and effect of wills, and the transmission of estates must be determined and had under and according to the laws of the State where the property is situated.

The power of the State to direct the descent and transmission of the estates of decedents, in cases of intestacy, as well as by will, is absolute; the jurisdiction of the Superior Court, sitting in probate, is under the control of the State Legislature; the property of an intestate decedent, under the statutes of California, is subject to the control of the probate court and does not vest in his heirs in a constitutional sense until heirship has been established by the decree provided for that purpose; as the Federal Government is not concerned in the manner of devolution of title through administration, the 14th Amendment cannot be invoked until after the title has been so vested, and, therefore, is not applicable here; as the probate proceedings attacked are proceedings *in rem,* relating to property wholly within the control of the State, the world is concluded by the rules of procedure it provides, however arbitrary; the bill does not show extrinsic or other fraud committed by any of the defendants, or any fraud committed by the executor; the decree is not subject to collateral attack; it was rendered after due notice given, construed the will, determined its provisions valid, ascertained, identified and distributed to its beneficiaries the properties of the estate; the will has been merged in the decree, and the decree is the source and measure of all rights to the estate, and is definitive and final.

In the interest of the peace of society and the permanent security of titles; in order that there shall be an end to litigation, and that a right established by a judgment shall be secure and certain, it is firmly established that where a court has jurisdiction of the parties and subject-matter, its judgment, whether it be regular or irregular, correct or erroneous, provided only it be not void upon its face, is not open to impeachment upon collateral attack. This is not merely an arbitrary rule of law, but a doctrine founded upon reason and the soundest principles of public policy. If this be not so—

> "A judgment, though unreversed and irreversible, could no longer be a final adjudication of the rights of litigants, but a starting point from which new litigation would spring up; acts of limitation would be useless and nugatory; purchasers on the faith of judicial process would find no protection, and a cloud would rest upon every title."
>
> Lancaster *v.* Wilson, 27 Gratt., 624.

It is manifest that complainant cannot be heard upon any question relating to the validity of the will of General Williams, unless the bill shows: (1) That in the procurement of the decree of final distribution he was deprived of a right guaranteed by the Fourteenth Amendment to the Federal Constitution, that is to say, unless the constructive notice of ten days given by posting the notice of the executor's petition for final distribution and of the settlement of his final account resulted in distributing the interest he claims in the estate without due process of law; or, (2) Unless the defendants were guilty of fraud extrinsic to the merits involved in the proceeding for distribution.

To determine whether the Fourteenth Amendment has been infringed it will be necessary to consider the nature of the right asserted in order to ascertain whether it can be applied to cases of this character, and if so, whether its provision relating to due process has been violated.

A.

THE LAWS OF THIS STATE PROVIDE THE RULES WHICH CONTROL THE CONSTRUCTION OF WILLS AND THE TRANSMISSION OF ESTATES.

The rules governing the devolution of title to property in any country are of necessity more or less arbitrary and artificial, "Creatures of the Civil Polity and *juris positivi* merely" (21 Bl. Com., 211). The English Statute of Distributions having been founded upon the feudal system, is incompatible with the institutions and genius of this age and people, and has been universally rejected in the United States, where each State has established a law of descent or succession for itself.

"It is a principle firmly established," says the Supreme Court in De Vaughn *v.* Hutchinson, 165 U. S., 570:

> "That to the law of the State in which the land is situated we must look for the rules which govern the descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."

In Wenton *v.* House of Mercy, 101 Fed., 382, the court, on page 398, referred to the doctrine announced in the case just quoted from, and added as sustaining and controlling authorities of a well-known and established principle of law:

McCormick *v.* Sullivant, 10 Wheat., 192.
U. S. *v.* Crosby, 7 Cranch, 115.
Arndt *v.* Griggs, 134 U. S., 316.
Clark *v.* Graham, 6 Wheat., 577.
Hutchinson Investment Company *v.* Caldwell, 152 U. S., 65.
McGoon *v.* Scales, 9 Wall., 23.
Birne *v.* Burron, 52 Tex., 396.
Brine *v.* Insurance Company, 96 U. S., 627.
Osborne *v.* McCartney, 121 Ill., 408.

In United States *v.* Fox, 94 U. S., 315, Justice Field, on page 320, says:

> "It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, *descent,* or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated (McCormick *v.* Sullivant, 10 Wheat., 202). The power of the State in this respect follows from her sovereignty within her limits. The title and modes of disposition of real property within the State, whether *inter vivos* or *testamentary,* are not matters placed under the control of Federal authority. Such control would be foreign to the principle for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

As said by the Supreme Court of the United States in Clark *v.* Graham, 6 Wheat., 579:

> "It is perfectly clear that no title to lands can be acquired or possessed unless according to the laws of the State in which the same are situated."
> 3 Washburne on Real Property, 238.

This is but the general statement of an elementary, well-known and firmly established principle of law.

De Vaughn *v.* Hutchinson, 165 U. S., 570.
Wenton *v.* House of Mercy, 101 Fed., 382.
3 Washburne on Real Property, 238.

Many exemplifying illustrations may be suggested:

The law of the situs of land governs its acquisition, enjoyment, alienation, and transfer, and the effect of the instrument intended to convey it; whether we may inherit it; the terms and conditions upon which we may continue in its possession; the power of transmission to others upon our death by will; the right of eminent domain applicable to it;

the easements and servitudes which may be imposed upon it; what shall constitute waste or destruction of it; what shall constitute a public use of it; to what extent and for what purposes taxes may be imposed upon it; what shall constitute a nuisance thereon; what passes as appurtenant or appendant to the title, and all other incidents of private ownership, limitations, and burdens, rest upon and are determed by the *lex rei sitae,* which applies to all classes of property, because, where justice requires that the situs shall govern, *lex rei sitae* applies as well to personalty as to realty.

Green *v.* Buskirk, 7 Wall., 139.
Broderick's Will, 21 Wall., 503; 22 L. Ed., 604.

"It is a well-recognized principle that every State possesses exclusive sovereignty over persons and property within its territory."

Moore *v.* Wayne, 55 Mich., 84, 87.

There is no natural right to take by will or to inherit upon intestacy.

"The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely."

In re Walkerly Estate, 108 Cal., 653.
United States *v.* Perkins, 163 U. S., 625; 16 Sup. Ct., 1073, 1074.
Mager *v.* Grima, 8 How., 490.
State *v.* Dalrymple, 70 Md., 294; 17 Atl., 82.

"It is established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State."

Plummer *v.* Color, 178 U. S., 115, 20 Sup. Ct., 829, 837.

As said in Scholey *v.* Rew, 23 Wall., 331:

> "The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege; and therefore the authority which confers it may impose conditions upon it."

In United States *v.* Perkins, 163 U. S., 625, 16 Sup. Ct., 1073, Mr. Justice Brown says, on p. 1074:

> "Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions on its exercise as it may deem conducive to public good."
>
> United States *v.* Fox, 94 U. S., 315.
> Mager *v.* Grima, 8 How., 490.
> Scholey *v.* Rew, 23 Wall., 331.
> State *v.* Dalrymple, 70 Md., 294; 17 Atl., 82.

It is clear that, as a mere question of power, the legislative authority would have a perfect right to provide that estates shall be administered and distributed without any other notice than the one given upon application for letters of administration or letters testamentary.

It is clear that the law of the situs of property not only determines the conditions and limitations upon which it may be possessed and transferred *inter vivos* and *inter partes,* but absolutely controls the devolution of title to property of deceased persons both under will and upon intestacy. It determines upon whom the estate is cast immediately on the death of the ancestor. It may exclude aliens from any benefits; circumscribe, limit or prohibit the exercise of testamentary disposition; impose arbitrary lineal or collateral inheritance taxes; escheat to state, county, city, town, or otherwise. In short to the law of the State must we look for the rules which control the acquisition, enjoyment, alienation, inheritance and succession of and to all property within its

sovereignty. To apply the general statement to the case at bar, the right to take property by devise or descent is a creature of the law, and not a natural right. It is a privilege, and therefore the authority which confers it may impose conditions upon it.

Scholey *v.* Rew, 23 Wall., 331.
Estate of Davis, 136 Cal., 590, 597.

B.

JURISDICTION TO ADMINISTER THE ESTATE WAS DULY ACQUIRED.

Section 5 of Article VI of the California Constitution, reading in part: "The Superior Court shall have original jurisdiction * * * of all matters of probate," confers original and plenary jurisdiction upon the superior courts over all matters of probate. The legislature of the State has enacted a complete set of laws to supply the necessary machinery to execute the power thus vested.

The provisions of the statute are calculated to secure a thorough investigation by anyone interested, after reasonable notice and full opportunity afforded, of any and all questions affecting competency, restraint, undue influence, fraudulent representations, and any other cause relating to the validity of the will, and any question concerning the legality of its provisions.

A petition for probate of the will may be filed by the personal representative or any person interested in the estate (sec. 1299 Code of Civil Procedure); a day set for hearing not less than ten nor more than thirty days; notice must be published in a newspaper in the county, if there is one, if not, then by posting in three of the most public places in the county; copies of the notice must be mailed to the heirs residing in the State, if their places of residence be known to the petitioner, and to any executor named as executor not joining as petitioner (sec. 1304); any person interested may appear at the hearing to contest the validity of the will to

prevent probate (secs. 1307, 1312); any person interested may, at any time within one year after probate, contest the same or the validity of the will (sec. 1327); citations must be issued to legatees, heirs and personal representatives (sec. 1328); and served as a summons in a civil action (sec. 1709), for not less than five days before return day (sec. 1711); notice to creditors must be published for not less than once a week for four weeks (sec. 1490); personal representative must render an account within six months after appointment (sec. 1622); and within thirty days after expiration of time mentioned in notice to creditors (sec. 1628); of which notice must be given by posting or publication for at least ten days, when the account be for a final settlement (secs. 1633, 1634), and which may be contested by any person interested (secs. 1635, 1636); partial distribution may be had at any time after the lapse of four months by any heir, devisee or legatee, upon giving bond to pay his proportion of the debts (sec. 1658), and giving notice in the manner required to be given by a personal representative of the settlement of an account (sec. 1659); at any time after the lapse of one year from the issuance of letters, any heir, devisee or legatee may apply for distribution of his share of the net proceeds of the estate, of which notice must be given as required by section sixteen hundred and fifty-nine (sec. 1659); at any time after the expiration of one year from the issuance of letters, any person claiming to be an heir may file his petition, and give notice not less than sixty days, and serve the same as a summons is served, and have the court ascertain and declare the rights of all persons to the estate and all interests therein (sec. 1664); upon the final settlement of the accounts of the personal representative, or at any subsequent time, upon his application or that of any person interested, the court *must* proceed, after notice (sec. 1668) to distribute the residue of the estate among the persons entitled thereto (sec. 1665).

Mr. Justice Bradley, in his powerful opinion on the cele-

brated case reported as Broderick's Will, 21 Wall., 517, thus characterizes the probate laws of California:

> "It is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth."

It is shown by the bill that proceedings were had in the Superior Court of the City and County of San Francisco, which resulted in the establishment and admission to probate of the will of General Williams; the issuance of letters testamentary to Judge George E. Williams; his qualification as executor, and his taking and continuing in possession of the estate until the decree of final distribution was made and obeyed.

The decree of the Superior Court establishing a will is conclusive. It operates *in rem;* it is binding and conclusive in all courts and places; all the world are parties. A decree establishing a will operates upon the thing itself, creates and defines its status, and the judgment binds and concludes the whole world. The authorities are overwhelming in support of this position. We have found none to the contrary.

Kearney *v.* Kearney, 72 Cal., 591, 593.
Woodruff *v.* Taylor, 20 Vt., 65.
William Hill Co. *v.* Lawler, 116 Cal., 359.

In State of California *v.* McGlynn, 20 Cal., 204, on page 264 *et seq.,* the court states the purpose, scope, and futility of the inquiry before the court, thus:

> "The fact that a will purporting to be the genuine will of Broderick, devising his estate to a devisee capable of inheriting and holding it, has been admitted to probate and established as a genuine will by the decree of a probate court having jurisdiction of the case, renders it necessary to decide whether that decree, and the will established by it, or either of them, can be set aside and vacated by the judgment of any other court. If it should be found that the decree of the probate court, not reversed by the appellate court, is final and conclusive, and not liable to be vacated and questioned by any other court,

> either incidentally or by any direct proceeding, for the purpose of impeaching it, and that so long as the probate stands the will must be recognized and admitted in all courts to be valid, then it will be immaterial and useless to inquire whether the will in question was in fact genuine or forged."

In California the jurisdiction of the court is conclusive in regard to the probate of wills of real and personal estate. The probate of a will is a proceeding *in rem*. It operates upon the thing itself and defines its status, and makes the instrument (at least so far as property of the testator within this State is concerned), just what the decree declares it to be. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and courts—the world is concluded, and the succession is governed accordingly. The probate of a will is not a proceeding to decide a contest between parties, but a proceeding *in rem* to determine the character and validity of an instrument affecting the title to property, which, for the purpose of society should be definitely settled by one judgment, and not left to be buffeted about by different and possibly conflicting judgments of various courts.

Adams *v.* De Cook, 1 McAll., 253; 1 Fed. Cas., No. 51, p. 102.
Derland and James *v.* Harrington's Heirs, 29 Ala., 95.
Bogardus *v.* Clark, 4 Paige, 625.
Woodruff *v.* Taylor, 20 Vt., 65.
Ballou *v.* Hudson, 13 Gratt., 682.
Kearney *v.* Kearney, 72 Cal., 591, 593-4.
Curtis *v.* Underwood, 101 Cal., 661, 670.
Case of Broderick's Will, 21 Wall., 503, 509.
In re Maxwell, 74 Cal., 384.
In re Griffith, 84 Cal., 107, 113.
Crall *v.* Poso, 87 Cal., 147.
The William Hill Co. *v.* Lawler, 116 Cal., 359.
Mulcahey *v.* Dow, 131 Cal., 73.
State *v.* McGlynn, 20 Cal., 233, 271.
Estate of Davis, 136 Cal., 590, 594-5.

It necessarily follows that the court which issued the letters acquired general jurisdiction to administer the estate.

Ackerson *v.* Orchard, 35 Pac., 605.

Bearing in mind that the right to inherit is essentially artificial, a creation and creature of the local law—in the nature of a gift from the State to the beneficiary, it is evident that, as a mere question of power, the State is not bound to accord either personal or constructive notice of every or any proceeding during the course of administration.

Ackerson *v.* Orchard, 35 Pac., 605.

Halet *v.* Patrick, 49 Cal., 595.

Having provided by statute the rules governing devolution of title under wills and succession to estates, the State may rest upon the doctrine that those who claim an interest are charged with such knowledge of its status and condition, and of their rights, as personal attention and the statute affords.

The principle we contend for is thus stated by the Supreme Court of California:

> "The probate jurisdiction of the Superior Court is different from its law and equity jurisdiction in this—*it is essentially a jurisdiction under the control of the State legislature.*"
>
> Estate of Davis, 136 Cal., 590, 597.

C.

JURISDICTION TO DISTRIBUTE THE ESTATE WAS PROPERLY EXERCISED, AND HEREIN, AS TO PROCEEDINGS IN REM AND DUE PROCESS OF LAW.

In the Broderick will case it is said that the public interests requires that the estate of a deceased person, being deprived of a master and subject to all manner of claims, should at once devolve to a new and competent ownership;

that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected, and that the result should be firm and effectual.

The duty of accomplishing this is purely local. It is not a matter of national concern or vested in the Federal Government to determine who shall succeed to the estates of decedents, and so, upon principle, it must be that the procedure adopted by the State is binding upon the Federal courts.

The Fourteenth Amendment is invoked by the complainant upon the underlying theory that, assuming the invalidity of the will, General Williams died intestate, whereupon, *eo instante and ipso facto,* his estate vested in his heirs at law by operation of section 1384 Civil Code, which provides:

> "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of the administrator appointed by that court, for the purpose of administration."

That the heirs of an intestate immediately succeed to his title is of course the law of this State, abundantly sustained by authority (Trubody *v.* Trubody, 137 Cal., 172, 174; Hochstein *v.* Berghauser, 123 Cal., 681, 687; Smith *v.* Olmstead, 88 Cal., 588; Maddock *v.* Russell, 109 Cal., 442).

It is therefore apparent and cheerfully admitted that the title of the heirs does not originate in a decree of distribution, and that it does descend directly from the ancestor; but it is nevertheless insisted that the heir takes it upon and subject to the conditions and limitations provided by the law which transmits the estate. The very section which casts the estate annexes a condition that it shall be subject to the control of the probate court for the *purposes* of administration.

The purposes—"the objects of probate proceedings are to administer, settle, and distribute the estates of decedents" (Maddock *v.* Russell, 109 Cal., 422, 423; *In re* Burton, 93 Cal., 463).

It is manifest that one of the purposes of administration, in fact the ultimate purpose, is to adjudicate upon and decree distribution of the estate; all other proceedings during administration are mere preliminary steps in the management and control by the court of the assets of the estate (Overly *v.* Gordon, 20 Sup. Ct., 606; Mulcahey *v.* Dow, 131 Cal., 76; William Hill Co. *v.* Lawler, 116 Cal., 359; Matter of Trust of Trescony, 119 Cal., 568; Ladd *v.* Weiskopf, 64 N. Y., 99, 101).

Now, bearing in mind that with relation to each other the codes of this State are to be construed as one statute, sec. 4480, Pol. Code, People *v.* Fellows, 122 Cal., 237; St. Louis Nat. Bank *v.* Gay, 101 Cal., 288; Keys *v.* Cyrus, 100 Cal., 327; Bruner *v.* Superior Court, 92 Cal., 146; People *v.* Cent. Pac. R. R. Co., 83 Cal., 397; People *v.* Applegarth, 64 Cal., 230—it is clear that the various sections upon the subject of succession and probate are to be considered and construed as parts of one law—as the scheme devised by the State for directing the descent and transmission of property within its sovereignty upon the death of its owner.

In short the property of an intestate passes to the persons designated by the local law subject to the deductions and withdrawals, or exceptions, provided for by the rules governing the subject. It is not necessary to consider whether the title to that part of the estate which is used by the personal representative in the payment of the debts of the decedent, and for the expenses of administration, and for the family allowance, and that part which is set apart as a homestead, ever vested in the heir in the constitutional sense of that term, or whether if vested it was divested by its withdrawal as provided by statute. It is admitted that it vested *sub modo,* and it will be sufficiently accurate and answer all pur-

poses to assume that the property of the intestate passes to those persons who shall establish heirship in the manner provided, and after all authorized deductions have been made.

Curtis *v.* Schell, 129 Cal., 213.

Otto *v.* Long, 144 Cal., 144, was a suit to quiet title obtained by the plaintiff through the foreclosure of a mortgage made by a widow upon a probate homestead carved out of community property. The validity of the order of the Superior Court, setting apart the homestead, was collaterally attacked. It would be difficult to find a case more in point. Mr. Justice Shaw, delivering the opinion of the court, said (pp. 147-148):

> "Nor can the fact that *no notice is required to be given* before making the order or the fact that *it is not appealable* affect its validity against the heirs and devisees. The *right of* inheritance, the *power of testamentary disposition*, the NATURE AND MODE OF THE PROCEEDING FOR ADMINISTRATION, AS WELL AS THE CHARACTER OF THE EVIDENCE by which proof of the fact of disposition shall be preserved and the right of appeal in probate matters, are all within the exclusive control of the legislature. The persons who, by grace of the statute, are designated or constituted heirs or devisees, have no ground for a claim that they are deprived of their property without due process of law, merely because the same statutory law which provides that they shall inherit and that property may be disposed of by will has also provided that, notwithstanding such heirship or testamentary disposition, the court having jurisdiction of the estate of the deceased before distribution may under certain conditions, to be by it determined without notice, set apart some or all of the estate absolutely to the widow, and no appeal is allowed from the order. They take the estate subject to that very contingency, and they are not deprived of it in the sense intended by the constitutional inhibition when that contingency occurs."

The point is that the statute is the source and measure of complainant's rights; the court acquired jurisdiction over the estate by the probate of the will, the qualification and possession of the executor; no other notice in any proceeding need be given than that required by the statute; where no notice is required, none need be given.

Kearney *v.* Kearney, 72 Cal., 591, 594-5.

Proceedings *in Rem.*—While the term *"in rem"* may not admit of a definition sufficiently comprehensive and exact to include all cases which fall within its limits and exclude all which fall without, the nature of any particular proceeding in this respect may be ascertained by applying to it the test whether the judgment pronounced will operate upon and determine the *status* of the particular subject-matter, and bind the world so that the thing adjudicated upon is *ipso facto* rendered what the judgment declares it to be.

Woodruff *v.* Taylor, 20 Vt., 65.
Mankin *v.* Chandler, 2 Brock, 125.
2 Smith's Leading Cases, 585.
Bennett *v.* Fenton, 41 Fed., 284, 287-8.

For example, a decree admitting a will to probate, revoking the probate of a will, setting a will aside, a decree granting letters testamentary or of administration, an order directing the sale of real estate of a decedent, an order of final settlement and discharge of an executor or administrator, a decree of final distribution, the right and title to a homestead, the validity of a judicial proceeding by certiorari, the validity of a municipal tax, seizure for violation of revenue laws, and the like. In short, where the proceeding is fundamentally against or upon the thing or subject-matter, to determine its state or condition, the judgment rendered is a solemn declaration upon the *status* of the thing itself, and is purely *in rem*. In such cases no process need be issued, but constructive notice, by some prescribed publica-

tion, draws to the jurisdiction and concludes everybody affected by the proceeding, and makes the adjudication of a court of competent jurisdiction binding upon the world. The right of every possible claimant is determined. Necessarily in such case the notice is constructive, at least to the greater part of the world.

The matter is purely one of jurisdiction.

In Arndt *v.* Griggs, 10 Sup. Ct. Rep., the court, on pages 558-9, says:

> "What jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may be given by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purpose by publication, it is impotent to perfect the titles to real estate within its limits held by its own citizens. * * * But no such imperfections attend the sovereignty of the State. It has control over property within its limits, and the condition of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing title thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits, and, for the purpose of such determination, may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature. It is not a matter of national concern, or vested in the general government. It remains with the State; and, as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the con-

stitution, or against natural justice. So it has been repeatedly held, that the procedure established by the State, in this respect, is binding upon the Federal courts."

Justice Brown, speaking for the court in Arndt *v.* Griggs, cites the following cases, among others, as sustaining the power of a State to provide by statute that the title to land within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication only—that the jurisdiction to hear and determine in this class of cases may be obtained wholly and entirely by publication.

Cloyd *v.* Trotter, 118 Ill., 391, 9 N. E., 507.
Adams *v.* Cowles, 95 Mo., 501, 8 S. W., 711.
Wanstell *v.* Landry, 39 La. Ann., 312, 1 South., 893.
Essig *v.* Lower, 21 N. E., 1090.
Dillon *v.* Heller, 39 Kans., 599, 18 Pac., 693.
Gillespie *v.* Thomas, 23 Kan., 138.
Walkenhorst *v.* Lewis, 24 Kan., 420.
Rowe *v.* Palmer, 29 Kans., 337.
Venable *v.* Dutch, 37 Kan., 515, 519, 15 Pac., 520.
Hulling *v.* Railway Co., 130 U. S., 559, 9 U. S. Sup. Ct., 605.
Mellen *v.* Iron Works, 131 U. S., 352, 9 U. S. Sup. Ct., 781.

Strictly speaking, the foregoing cases were not *in rem*, but belonged to a large class partaking of that nature frequently designated as *quasi in rem*. They were in form *inter partes* and proceeded upon the theory that, having for their object the determination of some title or right to or concerning property, either seized, or attached, or *within* the jurisdiction, invested the court (though only as to parties and privies through publication of process) with authority to finally dispose of the questions involved.

The *probate of the will* of General Williams was not a proceeding to decide a contest between parties, but a proceeding *in rem* to determine the character and validity of an instrument affecting the title to his estate. The decree admitting that will to probate binds the world; it is conclusive in all courts and in all places. In this State the Superior Court, as a court of probate, has exclusive and conclusive jurisdiction over the probate of wills, and no other court will consider applications to set aside wills, or the probate thereof, upon any question of fraud or upon any other ground.

State *v.* McGlynn, 20 Cal., 266, 267, 269, 270.

And so with the *distribution of his estate:*

> "A proceeding to secure a decree of distribution is essentially a proceeding *in rem.* It has none of the characteristics of a proceeding *in personam.*"
>
> State *v.* McGlynn, 20 Cal., 234, 264.
> Estate of Davis, 136 Cal., 595, 596.
> Mulcahey *v.* Dow, 131 Cal., 77.
> William Hill Co. *v.* Lawler, 116 Cal., 359, 362.
> Crew *v.* Pratt, 119 Cal., 131, 150.
> Kearney *v.* Kearney, 72 Cal., 591, 593.
> Woodruff *v.* Taylor, 20 Vt., 65.
> Smith *v.* Westerfield, 88 Cal., 374, 378.

We have read nothing more strikingly applicable to contentions of the character here asserted than the following excerpt from Davidson *v.* New Orleans, 96 U. S., 97, found at pages 103-4 (concerning a common misunderstanding of the scope of the phrase "DUE PROCESS OF LAW," as found in the Fourteenth Amendment):

> "It is not a little remarkable that while this provision has been in the Constitution of the United States as a restraint upon the authority of the Federal Government for nearly a century, and while, during all that time, the manner in which the powers of the

Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been involved in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution as a restraint upon the power of the States only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty or property without due process of law.

"*There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIV Amendment.* In fact it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court, the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded."

DUE PROCESS OF LAW.—We submit that no question of a Federal nature is involved in this case. It is not a matter of National concern whether or no succession in cases of intestacy shall be determined under the ancient rules of the civil, the common, or the Scotch law, or through restricted and arbitrary rules of the local government. Who are heirs of a deceased person is determined and declared by statute. The transmission of the title to property of persons dying either testate or without disposing of it by will, and the method to be pursued for accomplishing its distribution, are matters which belong to and remain with the State, and no proceeding which it provides can be declared invalid as violative of any special inhibition of the Federal Constitution. As the heir takes by the grace of the State, he can only take to the extent and under the procedure established by the State. In short, inasmuch as in the administration

of the estates of deceased persons within its sovereignty, the State has entire freedom of choice as to the selection of persons who shall stand as heirs-at-law or beneficiaries of a decedent, intestate, or testate, and as to the methods and procedure by and through which succession is effected, it cannot be said that any fundamental rights are involved in probate proceedings. In matters of this sort the power to limit involves the power to dispense with limitations.

Considering the premises, and so far as concerns the National Government, how can it be that the process—the body of law, the method, the legislative scheme by which devolution is accomplished—established by a State to bestow property upon a person, can result in depriving that person of property (which he can only acquire through the procedure adopted by the State) without due process of law? Until the last step in the process designed to transmit the estate has been taken the title is in *fieri;* until then there has been no vesting of property and can be no divestitive act in a constitutional sense.

To state the point in another form:

Before the heir of an intestate can deal with the title of his ancestor, free from the control of the probate court, such title must be vested in the heir by a decree of final distribution, which is the last of a series of steps that must be taken in the probate court, as conditions precedent to the vesting of *such* title. Hence, until such title is thus vested, there is no property of which the heir can be divested *without due process of law.*

The complainant's argument is, in effect, not that the heir is deprived of vested property *without due process of law;* but rather that the procedure prescribed for the vesting of the title is inadequate to protect the supposed rights of absent would-be heirs.

As the Supreme Court of the United States has said in Allen *v.* Georgia, 17 Sup. Ct., 525, and again in Hovey *v.* Elliott, 17 Sup. Ct., 841, and again in Wilson *v.* North Carolina, 18 Sup. Ct., 838:

> "The plaintiff must have been deprived of one of those fundamental rights the observance of which is indispensable to the liberty of the citizen to justify our interference."

The same conclusion is inevitable by proceeding upon the theory that all persons interested in the estate were entitled to be heard.

As the probate jurisdiction of the Superior Court "is essentially a jurisdiction under the control of the State legislature" which the law-making power may enlarge or restrict, it necessarily follows that opportunity to be heard, accorded by the statute of the State controlling the subject matter, is sufficient to constitute due process of law. Lent *v.* Tillson, 72 Cal., 404.

In Lent *v.* Tillson, 72 Cal., the court, on pp. 413-4, says:

> "'In judging what is due process of law,' says Justice Bradley in Davidson *v.* New Orleans, 96 U. S. 97, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; *and if found to be suitable or admissible in the special case*, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law.'
>
> "In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand."

As said by Mr. Chief Justice Waite, in Walker *v.* Sauvinet, 92 U. S., 90:

> "Due process of law is process according to the law of the land. This process in the states is regulated by the law of the State."

It follows, as a necessary corollary, that if any notice is given, or its service made, in pursuance of the requirements of the statute, it cannot be violative of any inherent or con-

stitutional right of the persons affected thereby, and hence must be in accord with the law of the land, and amount to due process of law.

Estate of Davis, 136 Cal., 590, 596.
Wulzen *v.* Board of Supervisors, 101 Cal., 15, 22.
Burnam *v.* Commonwealth, 1 Duv. (S. C.), 210.
Shepherd *v.* Ware, 46 Minn., 174; 48 N. W., 775.
Taylor *v.* Judges of Court, 175 Mass., 71; 55 N. E., 812.
Dillon *v.* Heller, 39 Kan., 607; 18 Pac., 693.
In re Empire City Bank, 18 N. Y., 199, 216.

If the process used, says Justice Bradley, in Davidson *v.* New Orleans, 96 U. S., 97, be found suitable or admissible in the special case, it will be adjudged to be due process of law.

> "In other words, the sufficiency of the notice must be determined in each case from the particular circumstance of the case in hand."

As said by Mr. Justice Day, in Leigh *v.* Green (a case *inter partes*), 24 Sup. Ct., 392:

> "Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exertion of power 'as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the classes to which the one in question belongs,' it is due process of law" (Cooley's Const. Lim., 7th ed., 506).
>
> Bartlett *v.* Wilson, 59 Vt., 23.
> Berthoff *v.* O'Reilly, 74 New York, 509.
> *Ex parte* Ah Fook, 49 Cal., 402.
> Kuntz *v.* Sumpton, 2 L. R. A. (Ind.), and notes.

The class of cases to which this one belongs is *sui generis*. Coupled with the privilege of taking the estate of a deceased

intestate are the qualifications and conditions under which heirship is established and distribution made. The title which passes upon intestacy is inchoate; imperfect, unsettled and unfinished until the jurisdiction of the medium of transmission—the probate court, has been exhausted by the finality of its ultimate decree.

The objects of probate proceedings are to administer, settle and distribute the estates of deceased persons, and our system contemplates that these objects shall be accomplished with reasonable dispatch—that the administration shall be speedily accomplished, and closed, and the estate devolve to a new and competent ownership.

Maddock *v.* Russell, 109 Cal., 422, 423.
Estate of Moore, 72 Cal., 342.
Estate of Davis, 136 Cal., 596.
Carran *v.* O'Calligan, 125 Fed., 663.
Hamilton *v.* Brown, 161 U. S., 256.

The State has provided a complete and effective probate jurisdiction.

> "The world must move on and those who claim an interest in persons or things must be charged with notice of their status and condition and of the vicissitudes to which they are subject."
>
> Townsend *v.* Eichelberger, 38 N. E., 207, 208.
> De Mares *v.* Gilpin, 24 Pac., 568, 572.
> Merchants' Nat. Bank *v.* Spates, 23 S. E., 683, 685.
> Naddo *v.* Barden, 47 Fed., 787.
> Manning *v.* San Jacinto Tin Co., 9 Fed., 737-8.
> Rudland *v.* Mastick, 77 Fed., 688, 690.
> Robbins *v.* Hope, 57 Cal., 495.

A person is conclusively presumed to know the state of his own title to property.

Cobb *v.* Wright, 43 Minn., 85.
Robbins *v.* Hope, 57 Cal., 495

Neither upon principle or authority is a case of this character similar to one *inter partes*, where a vested title is attacked through process to bring parties and subject-matter within the jurisdiction of a judicial tribunal. Here the court had full and complete jurisdiction over the world, and possession of the *res*. Each step to be taken in the exercise of that jurisdiction was plainly pointed out by the statute. The heir is authorized to come in as an actor and seek his distributive share under rules which he is bound to know.

Nor does the fact that a claimant is a non-resident make the slightest difference. That fact may appeal to the discretion but cannot affect the jurisdiction of the court.

In Townsend *v.* Eichelberger, 38 N. E., 207, the court says, 208:

> "Much stress is placed on the ignorance of the plaintiff as to his rights and his absence from the State. But it is well settled that absence of the plaintiff from where the facts arose, or his residence in remote and secluded parts, making it difficult or impossible to obtain information, in no case affects the running of the statute."

In De Mares *v.* Gilpin, 24 Pac., 568, the plaintiff was a Mexican woman, wholly unacquainted with the English language, who was an infant when the frauds complained of were commited, and "ever since, except for a short period, hath been and still is a married woman, and by the laws, usages and customs of New Mexico * * * under the control, power and authority of her husband." She was married during all of the time, unfamiliar with business, and unable to read or write. The court held that those who claim an interest in property must be charged with knowledge of its status and condition and the vicissitudes to which it is subject.

In Rudland *v.* Mastic, 77 Fed., 688, the complainant was a half-breed Indian woman, who lived among savages in a remote and secluded region in British Columbia, and was

wholly uneducated and ignorant of her title to the property involved. The court held that she was bound by the law and barred by the statute.

The case of Broderick's Will, a leading case from California, which we have before referred to, 21 Wall., 503, is strongly analogous in principle. Forgery, fraud, conspiracy, concealment, and perjury were there charged to establish a trust. The complainants lived in a remote and secluded region in Australia; had never lived in California or the United States, and never heard, or had any opportunity of hearing, of Broderick's death, or the events connected with the probate of the will, or settlement of the estate, until more than eight years after its being filed for probate; that after first learning of the fraud they set to work diligently to discover the frauds alleged, and commenced suit within the statutory period thereafter.

The court, by Mr. Justice Bradley, after stating that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction; that the public interest requires that the estate of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud, and that the result should be firm and perpetual, says (pp. 518, 519):

> "What excuse have they to offer for not appearing in the probate court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the death of Broderick was fraudulently concealed. The only excuse attempted to be offered is, that they lived in a secluded region and did not hear of his death, or of the probate proceed-

> ings. *If this excuse could prevail it would unsettle all proceedings in rem.* * * *
>
> "* * * Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all of the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*."

The power of the State to adopt arbitrary rules concerning a subject-matter over which it has exclusive and absolute control, which applies as well to the giving of an estate as to the giving of an office, is well illustrated by the case of Kennard *v.* Louisiana, 92 U. S., 480, where the law of Louisiana provided for a proceeding by rule for testing the right to an office, and the party whose right was disputed was required to answer within twenty-four hours, and had to assume the burden of proof, and the case was to be tried immediately by the judge without a jury, and by preference over all matter or causes depending in the court, and the judgment to be signed the day of rendition, and an appeal to be taken within one day after the rendition of the judgment, and to be made returnable to the Supreme Court within two days, and the proceeding on appeal to be given precedence over all other business in the appellate tribunal, and the judgment upon the appeal to be final after the expiration of one day—it was held that this was due process within the meaning of the Fourteenth Amendment; that provision was made for the trial of the case before a court of competent jurisdiction; for bringing the party before the court; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal; for hearing and judgment in the appellate tribunal; that due

process of law does not necessarily imply delay; that neither public policy nor constitutional provision required more.

This case was approved in

Davidson *v.* Board of Adm'rs of New Orleans, 96 U. S., 105.

Hurtado *v.* State of California, 110 U. S., 533.

State *v.* Boswell, 4 N. E., 677.

Wilson *v.* State of North Carolina, 18 Sup. Ct., 438.

In Wilson *v.* North Carolina, 18 Sup. Ct., 435, the court says, on page 438:

> "The procedure was in accordance with the laws of the State. It was taken under a valid statute creating a State office in a constitutional manner, as the State court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the State legislature to determine. * * * Upon this subject it was said in the case of Allen *v.* Georgia, 166 U. S., 138; 17 Sup. Ct., 525: 'To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty, or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due process of law. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those *fundamental* rights the observance of which is indispensable to the liberty of the citizen, to justify our interference.'"

It has been expressly held by the Supreme Court of this State that the notice given in this case is sufficient, whether the heirs be resident or non-resident.

Estate of Davis, 136 Cal., 590, is directly in point and conclusive in the State courts that such notice as was given in the case at bar was in accordance with the statute, reasonable, and in no degree denied due process of law to the complainant. The relief sought in that case was that the will of Jacob Z. Davis was a forgery, conceived and executed by the legatees thereunder and certain other conspirators; that it was probated upon perjured testimony, and that the jury empaneled to try the will contest was corrupted to find the will valid. Davis, the deceased, died in 1896; the complaining heir lived in a foreign country, and did not know that Davis lived in San Francisco, or was dead, or of any of the proceedings surrounding the probate of his will, until September, 1899. The will was probated in August, 1898, the fraud practiced in the forgery of the will and the securing of its probate was discovered in May, 1900, and the petition to revoke was filed September, 1900.

The court said, pages 595, 596:

> "A proceeding relating to the probating of a will is essentially one *in rem*, and a statute providing for a constructive notice by publication or posting gives notice to the world (Crall *v.* Poso Irrigation Dist., 87 Cal., 147). Viewing this matter in the light of constitutional law, it is not necessary that there should be personal notice served upon any one. * * * The law as to constructive notice still remains upon the statute books entirely valid and effective, and by that notice this petitioner was notified of the hearing of the probate of the will in common with all other interested parties.
>
> "It is next asserted that the statute providing for constructive notice is unconstitutional in this, that the ten days herein provided is too short to serve as a constructive notice to the world, and that the period of time being so short, therefore the statute is unreasonable and consequently void. As before suggested, the proceeding as to the probate of a will is essentially one *in rem*, and in the very nature of things the State

> is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a proceeding where it has absolute possession of the *res*."

In William Hill Co. *v.* Lawler, 116 Cal., 359, Mr. Justice Harrison says:

> "A proceeding for distribution is in the nature of a proceeding *in rem*, the *res* being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. *By giving the notice directed by the Statute*, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate."
>
> Hanley *v.* Hanley, 114 Cal., 690, 694.
> Kearney *v.* Kearney, 72 Cal., 593, 595.
> Mulcahey *v.* Dow, 131 Cal., 77.
> *In re* Griffith, 84 Cal., 109.
> Ackerson *v.* Orchard, 35 Pac., 605.

In Kearney *v.* Kearney, 77 Cal., 595, it is held, as we have before seen, that it is sufficient to give the notice prescribed by the statute, and where no notice is required, none need be given.

Question 2. Is the decree of final distribution such a conclusive adjudication of the validity of the will and of the rights of heirs, legatees, and devisees that it became final upon the expiration of the period limited for appeal therefrom?

A DECREE OF FINAL DISTRIBUTION IS CONCLUSIVE AS TO THE CONSTRUCTION OF THE WILL AND THE PERSONS ENTITLED TO THE ESTATE OF THE TESTATOR.

A.

THE DECREE OF DISTRIBUTION JUDICIALLY CONSTRUED THE WILL, DETERMINED WHO WERE ITS BENEFICIARIES, AND IS FINAL.

No question is made as to the regularity of the proceedings for the issuance of letters testamentary. In fact it is alleged that such letters were regularly issued to Judge Williams, and that he qualified as executor, and took possession of the estate; therefore the court had jurisdiction of the estate for the purpose of administering it. Hence, having once acquired general jurisdiction over the subject-matter, and of all persons interested in the estate by the publication prescribed for probating the will, it would seem to follow that any irregularity in subsequent proceedings constitutes but mere error in the exercise of jurisdiction thus regularly acquired, which could only be corrected upon appeal. This seems sound upon principle, and is sustained by the case of Ackerson *v.* Orchard (Wash.) 35 Pac., 605, where it is held that the statute which gives to the administrator the right to immediate possession, vests jurisdiction in the probate court for all the purposes of jurisdiction. The court says:

> "It is contended that the order of sale made by the probate court is void, and that the court acquired no jurisdiction in the premises, in consequence of the failure to give notice required by law of the hearing

upon the petition to sell the real estate in question, and, as such order was void, then the whole proceedings relating to the sale were void for want of jurisdiction * * * It becomes important, therefore, to inquire when and how the probate court acquired jurisdiction of the estate. Section 1444 of the 1881 Code, provided that the administrator, upon his qualification, should have the right to the immediate possession of the estate of the deceased, both real and personal; and we are of the opinion that, upon the appointment and qualification of the administrator, the probate court acquired jurisdiction of the estate for the purposes of administration. It follows that the court did have jurisdiction of the estate, and its action could not be void for want of jurisdiction. It is true, the law then provided, in relation to sales of real estate, that a petition should first be presented to obtain an order therefor, and a citation issued thereon, notifying parties interested to appear at the time set for the hearing. But could not the legislature have dispensed with this petition? It seems to us unquestionably the legislature had such power, as the court acquired jurisdiction of the estate by the appointment and qualification of the administrator, and, the administration of an estate being a proceeding *in rem*, the legislature could have provided for a sale of the lands without any petition or notice whatever."

But we are not driven to rely upon the doctrine announced in this case. We find the probate court invested with general jurisdiction over the administration of the estate by the probate of the will, the appointment and qualification of the executor, and his possession of the property, and we find it alleged in the bill that notice of the settlement of the executor's final account and of the hearing of his petition for final distribution was given for the period of ten days as required by sections 1633 and 1634, Code Civ. Pro. The sole contention of complainant in this behalf is that the publication period was so short as to violate the inhibition of the 14th Amendment of the Federal Constitution, and that

the decree does not show that proof was made of such fact to the satisfaction of the court.

We have disposed of the first objection by showing that the whole matter of succession is within the exclusive and arbitrary control of the State, and we believe the second objection is equally untenable.

It is apparent that complainant was not really aggrieved because the notice was only posted ten days. The period of publication was immaterial to him. His position is purely technical and without a shadow of equity. Suppose the court had extended the publication period, or had ordered personal service, and it had been made—to what end? He affirms that he relied upon Judge Williams and accordingly believed that his wife had no interest in her father's estate. Hence if he had been personally served with notice of settlement of final account and of hearing the petition for final distribution, and had read the notice with the greatest care, or its contents had been faithfully explained to him, it would not have had the slightest tendency to shake his belief in what Judge Williams had told him, there was nothing in the notice to suggest that his wife had any interest in the estate, and so long as he believed that his wife was not a beneficiary, it is in the highest degree improbable that he would have deemed it of the slightest importance when the estate should be distributed among others. So long as he had no claim he cared nothing (Robbins *v.* Hope, 57 Cal., 493, 495). Legally the notice accorded with the requirements of the statute. How can it be said to be unreasonably or inequitably short when it is admitted that it would have served no purpose—would have been ignored had it been unreasonably long.

This, then, is the situation: we have a court of superior jurisdiction—a court of exclusive and conclusive jurisdiction over the probate of wills and the administration of the estates of decedents; we find that jurisdiction conferred by the Constitution, defined and regulated by the statute, regularly in-

voked as prescribed by law; executor appointed, qualified and in possession of the *res,* and the last step taken to transmit the title to a new and competent ownership, with all of the formalities provided by the rules controlling the subject—all this is admitted. With every intendment and presumption in favor of the regularity and validity of the proceedings of superior courts of general jurisdiction, we have an express provision of the statute rendering any record of the facts conferring jurisdiction, unnecessary.

> "Orders and decrees made by the court, or a judge thereof, need not recite the existence of facts, or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged."
>
> Section 1704, Code Civ. Pro.

The first point decided by any court, although it may not be in terms, is, that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties.

Clary *v.* Hoagland, 6 Cal., 688.
In re Eichhoff, 101 Cal., 600, 604.
Eichhoff *v.* Eichhoff, 107 Cal., 46.

The entry of a decree by a court, of necessity presupposes the fact that the court has found that due service has been had or an appearance has been entered.

In Hartley *v.* Boynton, 17 Fed., 873, the court, on page 875, says:

> "In all cases before a judgment or decree is rendered, whether it is so recited in the record entry or not, it is presumed that the court, before rendering a judgment or decree, ascertains and determines the fact that proper service has been had, or that there is an appearance for the party; for unless it appeared that the defendant was in court, no judgment or decree could properly be rendered. The entry of a judgment or decree of necessity presupposes the fact

that the court has found that due service has been had or an appearance has been entered."

In Applegate *v.* Lexington & Carter Min. Co., 6 U. S., Sup. Ct. Rep., 742 (s. c. 117 U. S., 255), the court, on page 748, said:

> "But the record contained no proof of the publication and posting of the notice as required by the statute, and it is insisted by the defendants in this case that the record itself must show the publication and posting of the notice as required by law, otherwise the jurisdiction of the court does not appear, and the decree is absolutely void, while it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless, indeed, the statute expressly or by implication requires it. The court which made the decree in the case of Clark *v.* Conkling, was a court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in favor of its jurisdiction (Kemp's Lessee *v.* Kennedy, — Cranch, 173; Voorhees *v.* Bank of U. S., 10 Pet., 449; Crignon *v.* Astor, 2 How., 319; Harvey *v.* Tyler, 2 Wall., 328). It is to be presumed that the court, before making its decree, took care to see that its order for constructive service, on which the right to make the decree depended, had been obeyed."
>
> Edmond *v.* Buel, 23 Conn., 243.
> Hagonmeyer *v.* Board, 82 Cal., 214.
> Plume *v.* Howard Saving Institution, 46 N. J. L., 211, 229.

In the face of the presumptions, conclusive as against a collateral attack, and the express language of the statute dispensing with the recital of jurisdictional prerequisities and the admission that the jurisdiction was in fact regularly in-

voked, counsel for complainant contend that the decree is void because it does not upon its face show a compliance with section 1638 C. C. P. A moment's consideration of the sections of the statute governing the matter will disclose the fallacy of this position.

> SEC. 1633. "When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper."
>
> SEC. 1634. "If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings."
>
> SEC. 1638. "The *account* must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact."

The first section quoted requires the clerk to give notice of the day of settlement, etc., when an account is rendered, It is admitted that this was done.

The second section requires the clerk, if the account is for a final settlement, and is accompanied by a petition for final distribution, to state those facts. It is not denied that this was done.

The third section quoted provides that the "account" must not be allowed until it is first proved that notice has been given as required by the preceding sections, and the decree must show that such proof was made to the satisfaction of the court.

The requirement of section 1638 that the *decree* must show that proof was made to the satisfaction of the court that notice of the settlement of the *account* was given, appears on the face of the decree to have been complied with by the recital, "and due notice of the filing of said account "having been given as by law required," and such recital is *conclusive* evidence of the fact.

Christofferson *v.* Pfenning, 48 Pac., 264, 265-6.
Freeman on Judgments, 130-133.
Estate of Sbarboro, 70 Cal., 149.
Ex Parte Sternes, 77 Cal., 156.
Ex Parte Ah Men, 77 Cal., 201.
Crew *v.* Pratt, 119 Cal., 139, 152-3.
Riely *v.* Lancaster, 39 Cal., 354.
Hahn *v.* Kelly, 34 Cal., 395, 430.
Munch *v.* McLaren, 9 Wash., 676; 38 Pac., 205.
Mulvey *v.* Gibbons, 87 Ill., 367.
Miller *v.* Handy, 40 Ill., 449.
Syle *v.* Horstman, 25 S. W., 802.
Mathews *v.* Hoff, 113 Ill., 90.

The decree also shows as follows:

> "And it appearing to the satisfaction of the court that due notice of the hearing of said petition of Thomas H. Williams, Jr., was given as required by law."

Reverting to section 1638, C. C. P., the provision therein that proof shall be made to the satisfaction of the court that the notice therein mentioned was given, is merely declaratory of what the law would otherwise require, were the law

silent on the subject. (Vanfleet on Collateral Attack, sec. 61, pp. 90-91.)

And since the section is silent as to the consequences to follow from the omission of a recital in the decree that such proof was made, the requirement in that respect must be considered as *merely directory* (McCrea *v.* Haraszthy, 51 Cal., 146, 149-150); and, therefore, the decree in controversy could not be regarded as invalid for its failure to contain such recital.

Upon a collateral or indirect attack on a domestic judgment pronounced by a court of general jurisdiction, a recital or finding that jurisdiction was acquired, will be conclusive; (*a*) for every fact not negatived by the record will be presumed in aid of the judgment, and it will be held to be void only when it affirmatively appears from the record that the court had no jurisdiction to render it; (*b*) any condition of facts consistent with the validity of the judgment, and not negatived by the record, will be presumed to have existed, rather than any which will defeat the judgment.

Eichhoff *v.* Eichhoff, 107 Cal., 42.
In re Eichhoff, 101 Cal., 600, 604-5.
Wilson *v.* Dougherty, 45 Cal., 34, 35.
Parker *v.* Altschul, 60 Cal., 380.
Caruthers *v.* Hensley, 90 Cal., 559, 560.
Paige *v.* Roeding, 96 Cal., 388.
Cockrill *v.* Clyma, 98 Cal., 123.
Von Schmidt *v.* Von Schmidt, 104 Cal., 547.
Christofferson *v.* Pfennig, 48 Pac., 264.
Mathews *v.* Hoff, 113 Ill., 90.
Hawath *v.* Huling 87 Ill., 23, 27.
Turner *v.* Jenkins, 79 Ill., 228.
Mulvey *v.* Gibbons, 87 Ill., 367.
Lyle *v.* Hortsman, 25 S. W., 802.
Plume *v.* Howard Saving Institution, 46 N. J. L., 211, 228, 229.

In re Eichhoff, 101 Cal., 603-5, the court said:

"The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so. * * * This presumption extends to everything necessary for the support of the judgment, as well those facts which are necessary to give the court jurisdiction of the defendant as those which are necessary to sustain its decision of fact or conclusion of law thereon. Every court is called upon to determine in the first instance whether it has jurisdiction to hear the cause before it, and its decision upon this point is entitled to the same presumption of verity as its decision upon any other point. It is also its duty, before it hears the complaint of the plaintiff, to determine whether the defendant has been properly brought before it. * * * A presumption that a court has neglected its official duty is never indulged. * * * The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy, that it had jurisdiction over the subject matter of the action, and of the defendant against whom the complaint was directed. * * * Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. * * * Nor does this presumption of its jurisdiction depend upon the existence of any record of the decision. The existence of the jurisdiction antedates its exercise, and does not depend upon any subsequent record thereof. * * * If it makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke any presumption. It is only when the record is silent that the necessity for presumption arises (Freeman on Judgments, sec. 124; Black on Judgments, sec. 271; Brittain *v.* Kinnaird, 1 Brod. & B., 432; Foot *v.* Stevens, 17 Wend, 483; Hart *v.* Seixas, 12 Wend, 40; Huntington *v.* Charlotte, 15 Vt., 46; Boker *v.* Chapline, 12 Iowa, 204; Pope *v.* Harrison, 16 Lea, 82;

Benefield *v.* Albert, 132 Ill., 671; Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec., 355; Sims *v.* Gay, 109 Ind., 501; McClanahan *v.* West, 100 Me., 320)."

Hill *v.* Finnigan, 77 Cal. 275, 11 Am. St. Rep., 279.

Sichler *v.* Look, 93 Cal., 600, 606.

Lyons *v.* Roach, 84 Cal., 30.

"Every presumption and intendment consistent with the record is to be indulged in favor of the order."

Wilson *v.* Dougherty, 46 Cal., 34, 35.

"If the order was warranted by any possible state of facts not negatived by the record, it must be presumed in justification of the action of the court that such state of facts existed (Caruthers *v.* Hensley, 90 Cal., 560). 'All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants (complainant) would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not' (Parker *v.* Altschul, 60 Cal., 380)."

Cockrill *v.* Clyma, 98 Cal., 123, 126.

Paige *v.* Roeding, 96 Cal., 388, 391.

Even upon a direct appeal, upon the judgment roll alone,

"All intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below will be presumed to have been thus presented, if the record shows nothing to the contrary."

Von Schmidt *v.* Von Schmidt, 104 Cal., 547, 549, 550.

The case of Langton *v.* Blackburn, 109 Cal., 19, is instructive and very much in point. There as here the suit was to enforce an alleged trust. The complaint averred the death of the deceased in January, 1888; that plaintiff's

intestate was his sister; that prior to his death deceased became weak and subject to the control of the defendants, who conspired to defraud the plaintiff's intestate and cheat her out of her one-fourth of the estate, which was worth one million dollars; that accordingly they caused a will to be prepared giving the property to them, and had a third person hold the hand of deceased and cause him to sign the will, without volition or knowledge; that the defendants probated the will, and, to carry out their scheme to deprive plaintiff of her share, hired her son to tell her that her share in the estate was three thousand dollars, which defendants thereupon paid her; that plaintiff's intestate believed her son, made no inquiries, and knew nothing of the probate proceedings.

The analogy to the case at bar lies in the fact that there, as here, the complainant claims, but his complaint does not aver, extrinsic and collateral fraud. There the heir-at-law was told that her interest in the estate amounted to $3000.00, and, relying upon the statement, she made no inquiries, and she knew nothing of the proceedings in probate. Here it is alleged that the executor of General Williams' will declared to complainant that his deceased wife had no interest in the estate of her father, or property of any kind, and that she left no estate; that he relied upon said statements and was induced thereby to and did forbear any further inquiry relating to his deceased wife's estate. There, as here, it was asserted that the rights of the claimant were not presented for determination.

The court conceded, without deciding, *pro hac vice*, that the rule as to extrinsic or collateral fraud applies to judgments of probate courts, but held that the allegations were not sufficient to bring the case within the rule, because the plaintiff's intestate "must have known of the death of her brother, and presumably must have known that he left a large estate," *and that it was her duty to make inquiry as to the validity and contents of the will;* that there was no excuse for her remaining quiet and making no inquiry for

nearly four years; and finally held that, assuming the facts alleged to be true, they did not constitute such extrinsic or collateral fraud as to entitle the plaintiff to any relief.

If the decree was warranted by any possible state of facts not negatived by the record, it must be presumed in justification of the action of the court that such state of facts existed. Caruthers *v.* Hansley, 90 Cal., 560. Therefore, it must be assumed that before the final account was settled, it was proved to the satisfaction of the court that proper notice of the proceeding had been given. Jurisdiction, then, not only actually existed, but it was duly established by the requisite proof, and was properly exercised. As Justice Field says, in Hall *v.* Low, 102 U. S., 461:

> "When application is made, the court must consider whether it is made by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given. Its order made thereon is an adjudication of these matters."

The existence of the jurisdiction of the court in this matter antedated its exercise, and did not depend upon any subsequent record thereof. *In re* Eichhoff, 101 Cal., 603-5. If the decree recites that proper notice was given, that recital is made conclusive evidence of the fact, save upon direct appeal. If it does not so recite, the matter is subject to review on appeal from the decree, and on such appeal only, to the end that the judgment shall be amended, if warranted by the fact, to conform to the direction of the statute.

Section 1665, Code Civ. Pro., authorizes distribution of the estate upon the settlement of the final account of the executor. That course was pursued in this case. Each step taken was in accordance with the statute. The statute does not require the decree to show that notice was given, so far as distribution is concerned, and it is evident that the decree may be open to attack so far as the settlement of the "account" is concerned, and be conclusive as to its distribution of the estate. There is no question in this case as to the

sufficiency in form of the decree in distributing the estate, and we submit that it cannot be attacked in this action because of a mere informality in failing to fully recite matter required to appear in so far only as the allowance of the "*account*" is involved.

Recalling the constant invocation and approval by the Supreme Court of California of the doctrine that all presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and the express language of section 1704, Code Civ. Pro., it is a bit shocking to be called upon to defend a decree of final *distribution* in a case where jurisdiction was admittedly invoked and exercised according to the procedure prescribed simply because the decree technically fails to formally record upon its face the *proof* of a statutory requirement relating to the settlement of an "account."

A complete answer to the whole matter is that, assuming, for the sake of the argument only, the technical correctness of the criticism made as to the recitals of the decree, the objection goes no further than to the settlement of the "account"—but even if it be more far reaching and affect the distribution features of the decree, the question cannot be raised collaterally.

But, supposing the decree in this respect can be questioned in a collateral proceeding, or to go a step further, assume this to be a direct attack, what then?

It cannot be doubted that every court has inherent power to cause its acts and proceedings to be correctly set out in its records; that it may amend its record to correspond with the actual facts—so as to speak the truth, and that the power of the court to amend its records so that they may correspond with the facts, and correctly express what occurred, may be exercised at any time (Crum *v.* Kessing, 89 Cal., 478; Egan *v.* Egan, 90 Cal., 15; Frink *v.* Frink, 43 N. H., 508; Balch *v.* Shaw, 7 Cush., 282; Fay *v.* Wenzell, 8 Cush., 315; Hart *v.* Reynolds, 3 Cow., 42, note).

> "No lapse of time will divest the court of its power or absolve it from its duty to supply deficiencies in the records of its own proceedings where justice and the truth of the case require it" (Lewis *v.* Ross, 37 Me., 230).

In Kaufman *v.* Shain, 111 Cal., 16, Mr. Justice Harrison rendered an elaborate opinion sustaining the power of the court to amend its judgment so as to conform to the facts established by its record, and cites many cases, some of our own State, showing that judgments have been so amended as long as twenty years after the judgments had been rendered.

The apparent earnestness of opposing counsel upon this subject, demanded and received our patient examination of the question, which has convinced us at once of the fallacy of the contention, and of the conclusiveness of the decree, and we may be pardoned for considering the matter more at length, to the end that it may be set at absolute rest.

B.

THE DECREE IS SUFFICIENT ON ITS FACE, EVEN IF IT FAILS TO SHOW PROOF OF NOTICE WAS MADE.

Assuming that the decree of final distribution fails to show that proof to the satisfaction of the court had been made, that the notice mentioned in section 1638 of the Code of Civil Procedure had been given for the time and in the manner prescribed by law, it is not void for that reason.

The court was without power to proceed to a hearing and settlement of the final account without first ascertaining that the notice of the time and place, fixed for such hearing and settlement, had been given for the time and in the manner prescribed by the Code. Proof that such notice was thus given was, therefore, a condition precedent to the exercise of jurisdiction by the court to hear and settle the account. It was a step *in limine.*

Since the Superior Court, while sitting as a probate court, must be accorded all the presumptions and intendments as are indulged in favor of courts of record, having general jurisdiction, the inevitable conclusion flowing from the fact that the court did settle and allow the final account, is that it proceeded to hear the account only after proof *had* been made to *its satisfaction* that notice of such hearing and settlement had been given as required by law.

Burris *v.* Kennedy, 108 Cal., 331, 336-339.
Estate of Twombley, 120 Cal., 350, 351.

Estate of Twombley, 120 Cal., 350, *supra,* was an appeal from an order refusing to revoke the probate of a will and to grant letters thereon to the petitioner for revocation. A demurrer was sustained to the petition, which ruling was affirmed on appeal. Van Fleet, J., delivering the opinion, said (pp. 350-351):

> "The order admitting the will to probate was made and entered by the then probate court of Alameda county, on the fifth day of May, 1879. The petition for revocation was filed August 26, 1896—more than seventeen years thereafter. The sole ground urged for a reversal is that it appears from the averments of the petition that the probate court never acquired jurisdiction to admit said will to probate. This proposition is founded upon the fact, alleged in the petition, that no copy of the notice of the time appointed for the probate of the will was served, as required by the statute, either by mail, or personally, upon petitioner and the other heirs of the testatrix resident within the State; and that there is no proof on file, or order of the court showing such service. And it is argued that by reason of this fact the order admitting the will to probate was and is void.
>
> "It is to be observed that every presumption, not upset by the record itself, is to be indulged in support of the regularity and validity of the order. This presumption of regularity applies alike to the orders and decrees of the late probate courts, made within the limits of their restricted powers, as to proceedings

of courts of general jurisdiction (Irwin *v.* Scriber, 18 Cal., 499; Burris *v.* Kennedy, 108 Cal., 331, 337).

"The petition with the exhibits attached thereto shows that the will, accompanied by a petition for its probate stating the necessary jurisdictional facts, was duly filed in said probate court, and an order regularly made fixing a time for the hearing, and directing notice of the hearing to be given by publication, as required by the statute; that proof of the publication of the notice was duly made by the affidavit of the publisher, and that thereafter the court proceeded at the time designated to hear the application for probate, and upon such hearing made the order which it is sought to have vacated. These proceedings sufficiently show that the court acquired jurisdiction in the premises (Irwin *v.* Scriber, *supra;* Will of Warfield, 22 Cal., 64; 83 Am. Dec., 49). It is true the record does not show affirmatively that the notice of probate was served either by mail or personally, but the statute did not require that fact to appear of record, the requirement being simply that proof of the fact 'must be made at the hearing' (Code Civ. Proc., sec. 1304). While the record does not show that such proof was made, neither does it show that it was not, and in such case the presumption is that the necessary proof was made. The rule in this respect is, that where the record recites that which was done nothing to the contrary may be presumed; but where the record is silent the presumption is that that was done which was requisite to sustain the jurisdiction (Hahn *v.* Kelly, 34 Cal., 391; 94 Am. Dec., 742; Black on Judgments, sec. 284). And in the absence of any showing of fraud this presumption is conclusive."

It will be observed that no claim is made in the bill of complaint that notice of the time and place of the hearing of the account was not given in the manner and for the time required by the Code of Civil Procedure. Nor is it pretended that proof that such notice had been so given was not made at the hearing. It must, therefore, be presumed that the law with regard to notice was in all respects complied with.

The complainant, by setting forth as exhibit ("C") the decree in question, thereby has admitted that there was an adjudication by the court settling and allowing the final account of the executor and distributing the estate, necessarily embracing therein a finding that due notice had been given of such settlement.

Weigley *v.* Matson, 18 N. E., 881, 882; 125 Ill., 64.

In Shelby *v.* Creighton, 65 Neb., 485 (s. c. 91, N. W. R., 369; s. c. 101 Am. St. R., 630), the court, in speaking of the effect of the judgment of a probate court, settling the account of a surviving partnership with respect to the partnership affairs, which was subsequently sought to be set aside by a suit in equity, said (p. 492):

> "An estoppel by judgment or decree extends to all matters upon which it must have been founded. In other words, the judgment is a conclusion, and, if necessarily drawn from certain premises, such premises are as conclusive as the judgment itself" (Burlen *v.* Shannon, 99 Mass., 200; Perkins *v.* Walter, 19 Vt., 144; Hayes *v.* Shattuck, 21 Cal., 51; Tuska *v.* O'Brien, 68 N. Y., 446).

The estoppel must, therefore, extend to the matter of proof that notice of the settlement of the account had been given. It was the first thing which the court was called upon to find before it could proceed to settle the account.

It is well settled that—

> "Whenever the jurisdiction of a court of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack."
>
> People *v.* Hagar, 52 Cal., 171, 183.
>
> Spaulding *v.* Homestead, etc., Ass'n, 87 Cal., 40, 42.
>
> Farmer's, etc., Co. *v.* Board, 97 Cal., 318, 328.
>
> People *v.* Los Angeles, 133 Cal., 338, 342-343.
>
> German S. & L. Soc. *v.* Ramish, 137 Cal., 120, 130.
>
> Lingo *v.* Burford, 112 Mo., 149, 155.

A fortiori must the foregoing principle apply to courts of general jurisdiction, to which category the Superior Court belongs when administering the probate law.

In Fallbrook Irr. Dist. *v.* Bradley, 17 Sup. Ct. R., 56 (s. c. 164 U. S., 112, 173), referring to, and approving, People *v.* Hagar, 52 Cal., 171, *supra,* Mr. Justice Peckham delivering the opinion of the court, said (pp. 68-69):

> "In the case of People *v.* Hagar, 52 Cal., 171, 182, is was held that the board of supervisors, on presentation of the petition, was to hear and determine the questions of jurisdiction, and whether the allegations of the petition were true. An approval and confirmation of the petition, and the (reclamation) district was held to be a conclusive judgment by the board that the lands mentioned and in question were swamp lands, that the petitioners held the proper evidences of title thereto, and that the lands would be benefited by the reclamation. These *jurisdictional facts, it was held, must exist before the district could lawfully be established.*"

In Howard *v.* Bryan, 133 Cal., 257, the court uses this language (pp. 262-263):

> "This being a collateral attack upon the order (authorizing a mortgage by a guardian of his ward's property), only those facts and matters appearing upon the face of the record are to be considered; and if they show *no excess or defect of jurisdiction,* no mere error of the court in the exercise of its jurisdiction, or irregularity in the proceeding, will invalidate the order. And in examining the record the same presumptions are indulged in favor of the regularity and validity of the proceeding *as those which govern the construction of the record in an ordinary action* (Burris *v.* Kennedy, 108 Cal., 338)."

In Ions *v.* Harbison, 112 Cal., 260, a probate proceeding, it is said, at page 268, quoting from Burris *v.* Kennedy, 108 Cal., *supra,* page 340:

"If the court had jurisdiction, errors in the exercise of it, however gross, would not render the decision invalid."

Or, as was said in Bruce *v.* Osgood, 56 N. E., 23 (s. c., 154 Ind., 375), on page 26:

"The question is not whether in truth, as this court might decide on appeal, the Marion Superior Court had jurisdiction in the particular case, but whether or not that court was competent to decide that it had jurisdiction, and whether *it must have so decided before proceeding to judgment.*"

Clara *v.* Hoagland, 6 Cal., 668.
In re Eichhoff, 101 Cal., 600, 604.
Eichhoff *v.* Eichhoff, 107 Cal., 46.
Hartley *v.* Boynton, 17 Fed., 873.

In Haddock *v.* Haddock, 201 U. S., 607; 50 L. Ed. 885, the court, quoting from Applegate *v.* Lexington, &c., County Min. Co., 117 U. S., 225, 268; 29 L. Ed., 892, 896, says:

"While it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless, indeed, the statute, expressly or by implication, requires it. * * * Therefore every presumption not inconsistent with the record must be indulged in, in favor of its jurisdiction. * * * It is to be presumed that the court, before making its decree, took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed."

C.

A FAILURE OF A DECREE TO SHOW THAT PROOF OF NOTICE WAS MADE DOES NOT RENDER THE DECREE VOID ON ITS FACE.

Unless the law requires that a record be made or preserved either of the adjudication, or of the proof, of the existence of some facts upon the finding of which, as a condition precedent, a tribunal is authorized to assume jurisdiction over some proceeding before it, the absence of such a record does not disclose a fatal defect in jurisdiction exercised.

Barrett *v.* Carney, 33 Cal., 535-536, 541.

In 2 Freeman on Judgments, 4th ed., section 523, the following language is quoted from Stoddard *v.* Johnson, 75 Ind., 31, viz:

> "And it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed."

This same principle was stated in Estate of Bell, 131 Cal., 1, the question being whether upon the settlement of an account, a second order for a family allowance could be assailed collaterally on the ground that at the time of the making of the second order *the estate was insolvent,* the court held that such attack could not be made, saying (pp. 3-4):

> "Had the court power to make the second order? Or, bringing the question directly home, upon the hearing of an account of the executor may the creditors object to the allowance of moneys paid under this order? We are entirely satisfied the creditors cannot successfully support the contention made. The order is not void upon its face, and it is too late upon the hearing of the account to show that the estate was insolvent when the order was made, and

that therefore the court lacked jurisdiction to make it. * * * Conceding the court had no power to make the order *if the estate was insolvent, still the making of the order in itself is an adjudication that the* estate was not insolvent. In principle, this identical question is decided by the case of *In re* Welch, 106 Cal., 430, where the court, in speaking of an order of family allowance, said: 'It is asserted that this order is invalid *for lack of a finding that the property* exempt from execution and already set apart to the support of the widow *was insufficient* for the purpose. * * * The fact that the court, after setting aside exempt property, made its order for family allowance, *involved of necessity* the *decision* that the amount originally set apart *was insufficient.* The order for additional allowance *in itself was a declaration of that insufficiency.'*

"The time for appeal from the order has long gone by, and the attack here made is essentially a collateral attack. The making of the order *necessarily involved a determination* that the estate was solvent, and it is now proposed to show upon this collateral attack that the *finding of the court upon the solvency of the estate is untrue.* This cannot be done."

The court says further (pp. 4-5):

"It might with equal legal propriety be contended that the order of allowance was void, or at least void *pro tanto,* upon the ground that it was too large and that the amount was not necessary for the maintenance of the family. Of course, the validity of an order of allowance cannot be attacked collaterally upon these grounds. As far as the validity of any particular order of allowance is concerned, it must be held that these matters were considered and determined when the order was made, and *were determined in a way that supports the validity of the order made.* The same rule necessarily applies upon the question of the insolvency of the estate, and it must be held that when the court made the order or orders involved it *decided that the estate was solvent.* It is said in Burris *v.* Kennedy, 108 Cal., 336: 'The same presumption must now attach to decrees in pro-

bate proceedings upon collateral attack as to judgments in cases at common law or in equity.'"

In Evansville Ice, etc., Co. *v.* Winsor, 48 N. E. R., 592 (s. c., 148 Ind., 682), the court, in speaking of a court of general jurisdiction, said (p. 595):

> "When the jurisdiction of such a court depends upon the finding of certain facts the exercise of jurisdiction implies the finding of such facts. * * * Florentine *v.* Barton, 2 Wall., 210, 216. It was not necessary, therefore, that all the jurisdictional facts be set out in the order and judgment of the Vanderburg Circuit Court, a court of general jurisdiction. The *exercise of jurisdiction* in said proceeding, and making the final order and judgment therein, imply the *finding of the existence of all facts necessary to such jurisdiction.*"
>
> Wilson *v.* Otis, 71 N. W., 483, 488.
> S. c., 93 Am. St. R., 567.
> S. c., 53 Atl. R., 441.

In Osborn *v.* Sutton, 108 Ind., 443 (s. c., 9 N. E. R., 410, 411), the court, having under review the proceedings of a board of county commissioners in the matter of establishing a free gravel road, said (p. 445):

> "It was not necessary for the board of commissioners to enter a formal order declaring that it had jurisdiction of the case, or that all jurisdictional facts had been shown. A general order or judgment is a sufficient declaration of jurisdiction, for the assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction." (Citing cases.)

In Thornton *v.* Baker, 15 R. I., 558 (s. c., 2 Am. St. R., 925, 927; 10 Atl. R., 617, 618), the rule is stated thus (p. 555):

> "Where jurisdiction depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact. Erwin *v.* Lowry, 7 How., 172; Wyatt's Adm'r *v.* Steele, 26 Ala., 639."

D.

A JUDGMENT BECOMES EFFECTIVE UPON ITS RENDITION, IRRESPECTIVE OF THE DATE OF ITS ENTRY.

"The rendition of a judgment is a judicial act. Its entering upon the record is merely ministerial."

San Joaquin L. & W. Co. *v.* West, 99 Cal., 345, 347.
Crim *v.* Kessing, 89 Cal., 478, 488-489.
S. c., 23 Am. St. R., 491.
Schurtz *v.* Romer, 81 Cal., 244, 246-247.
People *v.* Lenon, 79 Cal., 631, 632.
1 Freeman on Judgments (4th ed.), sec. 38.

In Otto *v.* Long, 144 Cal., 144, the court said (p. 146):

"The fact that the homestead order was not filed, and presumably was not entered, until December 4, 1893—three days after the date of the mortgage—is of no importance. The order recites on its face that it was made November 27, 1893. *The entry of the order was not necessary to make it valid or effectual to pass the title.* In this respect it is subject to the same rule as a judgment, and becomes effectual as to the estate and those entitled to succession by law or devise, *as soon as it is made or rendered.* The entry of a judgment or order is a mere ministerial act of the clerk, and the lack of it does not take away or delay the effect of the adjudication except *where some statute expressly or by implication so provides.*"

(No *limitation*, such as Mr. Justice Shaw alludes to, affects the case at bar.)

In the case of *In re* Cook, 77 Cal., 220, the court, at page 228, quoting from Peck *v.* Courtis, 31 Cal., 207, 209, said:

"The rendition and entry of a judgment are entirely different things,—the one is to be performed by the court, and must be first in order of time."

In Estate of Hughston, 133 Cal., 321, it was held that where a judgment in a probate matter was not appealable at the time of its *rendition*, it did not become so under an amendment to the Code of Civil Procedure, making judgments of its character for the first time appealable, although such judgment was *entered* after the amendment became operative, and notwithstanding an appeal from such a judgment could not be prosecuted until *after its entry*. In this holding the court said (p. 323):

> "It is insisted that as the time for appeal only begins to run from the date of a judgment or order, and the judgments and orders in this case not having been entered until after the amendment went into effect, therefore the law is given no retroactive effect by holding that a right of appeal is granted in the present case. The court does not agree with this contention. *It is the judgment or order that the statute says may be appealed from.* * * * As to probate orders, decrees or judgments, their entry in the book prescribed by the statute is no part thereof. They are perfect and complete, and have full force and effect *before they are entered.* The right of appeal is given from the order or judgment, and may be exercised when the order or judgment is entered. It is the duty of the proper officer to make the entry, and he can be compelled to perform his duty. *The judgment is the result of judicial action. The entry of the judgment is purely a ministerial matter.*"

In Estate of Wood, 137 Cal., 129, the court said (p. 133):

> "The meaning of the word 'rendered' as applied to decrees and judgments is well settled, and when a decree or judgment is rendered it has full force and effect. Even the entry of it does not go to its validity. It has full force and effect regardless of the mere ministerial act of entering it upon the judgment-book. Mr. Freeman in his work on Judgments declares (vol. 1, sec. 38): 'Expressions occasionally find their way into reports and text-books indicating that the entry is essential to the existence and force of the

> judgment. These expressions have escaped from their authors when writing of matters of evidence, etc. * * * The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A judgment is not what is entered, but what is ordered and considered. The entry may express more or less than what was ordered by the court, or it may be neglected altogether, yet in neither of these cases is the judgment of the court any less its judgment than though it were accurately entered. * * * It is therefore not indispensable to the validity of an execution, and a sale made thereunder, that a judgment should have been actually entered before the writ issued.' (See, also, Estate of Hughston, 133 Cal., 321.) This principle of law applies even with more force to decrees in probate and equity. And this court has held more than once that when a decree of divorce is *rendered* that decree is of full force and effect (*In re* Newman, 75 Cal., 221; *In re* Cook, 77 Cal., 232; *In re* Cook, 83 Cal., 417)."

In the case of *In re* Cook, 77 Cal., 220, the court quotes approvingly from a Nevada decision, saying (pp. 226-227):

> "In Cal. S. Tel. Co. *v.* Patterson, 1 Nev., 151, which was a well-considered case, the question was, what constitutes a judgment? And the court say (p. 155): 'This motion seems to be based upon a misapprehension of what constitutes a judgment; and counsel seem to have confounded the judgment itself with the entry or record thereof. The judgment is a judicial act of the court; the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk. The *decision* of the court is the *judgment;* the *entry* is the *evidence* of it.'"

In the case of *In re* Cook, 83 Cal., 415, the court had before it for consideration collaterally the validity of a judgment of divorce *rendered* in the lifetime of the plaintiff, but *entered, nunc pro tunc, after her death.* Patterson, J., speak-

ing for the court, referring to a prior decision of the same case (*In re* Cook, 77 Cal., 220), said (pp. 417-418):

> "An examination of the opinion * * * will show that the decision went upon the grounds that * * * a judgment for divorce had been rendered by the court * * *, and entered in the minutes; that thus entered in the minutes, it was valid and binding as if it had been written and signed by the court, and being so, took effect at the time of its rendition; that the judgment having been rendered in the lifetime of Emma (the plaintiff), there was no error in entering it after her death, it being the duty of the clerk to enter the judgment at any time after its rendition, upon payment of fees, and the entry being but the *evidence* of the judgment *already in operation and effect.*"

In Marshall *v.* Taylor, 97 Cal., 422, Patterson, J., said (pp. 426-427):

> "The rule is, that where the court has actually rendered a judgment, but the same has not been entered on the record * * * an order may be made that the judgment rendered be entered *nunc pro tunc.* * * * In such a case the effect of the order is simply to *supply* matters of *evidence.* The record is merely amended by inserting in the memorial of the proceedings that which has been improperly *omitted* therefrom (1 Black on Judgments, secs. 128-133)."

The court in banc, speaking through Mr. Justice McFarland, say, in the case of *In re* Cook, 77 Cal., 220 (at page 227):

> "When, after the trial and final submission of the case the court pronounces a judgment in apt language, which finally determines the rights of the parties to the action, and leaves nothing more to be done except the ministerial act of the clerk in entering it, and especially when what the court has pronounced has been entered in the minutes, then the judgment has been rendered, and the rights of the parties established."

A judgment becomes operative immediately upon its *rendition,* and execution may therefore issue thereon at once before its formal *entry* of record.

Weigley *v.* Matson, 125 Ill, 64, 66.
16 N. E., 881, 882.
8 Am. St. R., 335, 336.

In Los Angeles Co. Bank *v.* Raynor, 61 Cal., 145, McKee, J., delivering the opinion, said (p. 147):

> "It is urged that the record shows that the judgment was not entered when the execution was issued. Nor was it necessary that it should have been. The enforcement of a judgment does not depend upon its *entry* or docketing. These are merely ministerial acts. * * * Neither is necessary for the issuance of an execution upon a judgment which has been duly rendered."

In Lowenstein *v.* Caruth, 59 Ark., 588 (s. c., 28 S. W., 421, 422), the court say (p. 592):

> "The enforcement of a judgment does not depend upon its entry. The record of it is only *evidence* of its existence, and an execution may be issued upon it before it is placed on record. Los Angeles County Bank *v.* Raynor, 61 Cal., 115."

In Fontaine *v.* Hudson, 93 Mo, 62 (s. c., 5 S. W., 692, 694; 3 Am. St. R., 515), the court state the same principle, thus (p. 70):

> "The right to the execution follows, *eo instanti,* upon the rendition of the judgment; the rendition of the judgment is the judicial act upon which the execution rests, its entry upon the record is a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy. A valid judgment rendered will support and validate an execution issued in conformity therewith, although the formal record evidence of its rendition may not have been in

existence at the time of the execution. It is sufficient if the record evidence is in existence when proof of the judgment becomes necessary."

E.

RECITAL THAT PROOF OF NOTICE HAS BEEN MADE SATISFIES SECTION 1638, CODE CIV. PRO.; PRESERVATION OF A RECORD OF THE CHARACTER OF PROOF MADE IS NOT REQUIRED.

Section 1638, Code Civ. Pro., does not require a record of the *finding* or of the *proof* that the notice therein referred to shall be made or preserved. Its mandate is simply that the decree shall *show* that such proof was made to the satisfaction of the court. A recital that such proof was made would be a compliance with the Code.

Section 1633 requires the clerk, when an account is rendered for settlement, to give notice thereof by causing notices to be posted in at least three public places in the county. Section 1634 provides that when the account is for a final settlement, and is accompanied by a petition for a final distribution, the notice must be given by posting * * * for at least ten days prior to the day of settlement. The bill shows (Trans., 13) that the final account of the executor was filed December 15, 1896, and was accompanied by his petition for final distribution; that thereupon an order was made directing that notice of the settlement of said account and petition be given by the posting of notices in three public places in the city and county of San Francisco (Trans., 14); that the 26th of December, 1896, was fixed as the day for the hearing, and notices were accordingly posted in three places in said city and county, to wit, one at the public morgue, one at the place where the court was held, in which the matter of the Williams estate was pending, and one at the United States court building (Trans., 11, 12).

The decree shows that the executor rendered and filed his final account, and his petition for a settlement of his administration and for distribution of the estate, on December 15, 1896; that due notice of the filing of said account was given as by law required; that Saturday, December 26, 1896, at 2 o'clock p. m., was appointed as the time for the settlement of said account; that the hearing of the executor's final account and of his petition for distribution came on regularly at the time fixed therefor, and were then and thereafter continued from time to time until January 5, 1897, when the matters before the court were heard (Trans., 26), the final account allowed and settled (Trans., 31-32), and the estate distributed (Trans., 26-51).

We contend that the decree upon its face shows that the final *account* was not allowed until it was proved that notice was given as required by the statute. But suppose it does not.

Section 1636 is silent as to the consequences to follow the omission of a recital in the decree that such proof was made, and, therefore, the requirement in that respect must be regarded as *merely directory*.

McCrea *v.* Haraszthy, 51 Cal., 146, 149-150.

The jurisdiction of a tribunal exercising judicial functions does not depend upon the preservation, of record, of proof of the service of process, but upon the fact of its service. This is so even in cases where the extraordinary power of taxation is exercised, *in invitum*.

Hellman *v.* Shoulters, 114 Cal., 136, 158.
Sichler *v.* Look, 93 Cal., 600, 608.
Hienlen *v.* Heilbron, 94 Cal., 636, 641.
In re Newman, 75 Cal., 213, 220.

In the case of *In re* Newman, 75 Cal., 213, was involved the validity of a judgment of divorce, by default, where jurisdiction was obtained by publication of the summons,

one of the questions being as to *when* the judgment became effective. Patterson, J., delivering the opinion of the court in banc, said (p. 221):

> "The decree was signed by the judge on October 19th, and was filed with the clerk on October 22, 1885. Thus *rendered*, it was binding on the parties and privies, although not entered until January 5, 1887. The clerk could not, by his failure to perform a ministerial duty, abridge the rights of any party interested (Casement *v.* Ringgold, 28 Cal., 339; Gray *v.* Palmer, 28 Cal., 442)."

In Canadian, etc., Co. *v.* Clarita, etc., Co., 140 Cal. 672, Angellotti, J., delivering the opinion, says (p. 674):

> "Whether a judgment is void upon its face can only be determined by an inspection of the judgment-roll. (People *v.* Temple, 103 Cal., 447; Jacks *v.* Baldez, 97 Cal., 91.) The question is to be determined on inspection of the record only. (Butler *v.* Soule, 124 Cal., 72.) * * * Unless the record of the judgment itself affirmatively shows that the court was without jurisdiction to render the judgment, the judgment is not void upon its face. (See cases cited, *supra*.)"

In McHatton *v.* Rhodes, 143 Cal., 275, in the opinion, quoting from *In re* Eichhoff, 101 Cal., 602, it is said (p. 279):

> "Nor does this presumption of its jurisdiction to make the decision depend upon the existence of any record of the decision."

In McHatton *v.* Rhodes, 143 Cal., 275, the court, quoting from *In re* Eichhoff, 101 Cal., 602, say (pp. 278-279):

> " 'The fact that the court has rendered a judgment implies a determination by it, before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. * * *

> The presumption of its jurisdiction exists because it has been authorized to determine this question in the same mode as any other question of fact upon which its judgment is to rest, and its decision thereon is presumed to have been made upon evidence sufficient to sustain it. Its determination upon this question is to be made upon evidence of some nature, and, whether this evidence is sufficient or insufficient to support this conclusion thereon, it has the jurisdiction to make the determination; and if its conclusion is incorrect, it is merely error, which can be reviewed only upon a direct appeal. Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point, as upon any other issue which it may determine without evidence.'"

Again, at page 279, the court say further:

> "We think the rule above stated applies equally to a judgment obtained against a nonresident by publication. The court has jurisdiction in such case, *provided certain things are done.* Notice must be given as provided by the statutes of the State. The court must determine before giving judgment that such things have been done. * * * The presumption is the same where service has been made by publication as where personal service has been had."

F.

THE SHOWING REQUIRED BY SECTION 1638, CODE CIVIL PROCEDURE, AS TO NOTICE, IS A MERE RECITAL, AND NOT AN ADJUDICATION.

The showing, when made by a decree as prescribed by section 1638 of the Code of Civil Procedure, is not evidence of an adjudication by the court that notice has been given as required by that section; nor is it evidence of the fact that such notice has been so given. It is simply evidence that, according to the opinion of the court, there was proof

made which satisfied it that the notice had been given in accordance with the mandate of said section 1638, although the fact might well be either that no evidence was received on that question, or that such as was heard on the subject was admittedly insufficient.

A mere recital, which is the usual mode in such cases, would be a fulfillment of the requirement as to proof of notice. The court will certainly take judicial notice that such is the practice in cases of like character.

But a *recital* is not an adjudication. It is, at most, a finding of fact.

In Herd *v.* Tuohy, 133 Cal., 55, the court say, on page 61:

> "This is a mere recital of a fact preceding the actual judgment, and cannot be regarded as an adjudication."

G.

ABSENCE FROM A DECREE OF A RECITAL SHOWING DUE NOTICE MAY BE SUPPLIED BY AMENDMENT AT ANY TIME.

Since the decree of the court presupposes that proof of notice was made at the hearing, the omitted recital in that respect may, if necessary, be added by amendment, at any time.

The recital, in its relation to the adjudicating part of the decree, is of no greater efficacy than a certificate or affidavit of service of process. Yet, when a motion is made to vacate or set aside a judgment because such certificate or affidavit is either insufficient or has been entirely omitted, the court will, on a counter motion, direct an amendment correcting the defective certificate or affidavit, or supplying its omission, and thereupon deny the former motion.

Foreman *v.* Carter, 9 Kans., 674, 681-4.

Burr *v.* Seymour, 45 N. W., 715-716.

S. C., 43 Minn., 401, 402-403; 19 Am. St. R., 245.

Sichler *v.* Look, 93 Cal., 600, 605.

In Allison *v.* Thomas, 72 Cal., 562, 1 Am. St. R., 89, a correction of the sheriff's defective certificate of service of summons was allowed in a justice's court after there had been a sale under execution.

Although the Code of Civil Procedure prescribes the *mode* of proof of service of summons (sec. 415); provides that *default* may be entered after the expiration of the time within which the defendant should appear (sec. 585), and that in case of a judgment by default for not answering, the judgment-roll shall, among other papers, contain the summons, *together with written evidence of the fact of its service* (sec. 670), yet the law is that, in order to make it appear of record that the court had jurisdiction to pronounce a judgment rendered or actually entered, the record may be amended by correcting the affidavit of service.

Herman *v.* Santee, 103 Cal., 519, 523-525; 42 Am. St. R., 145.

Hibernia S. & L. Soc. *v.* Matthal, 116 Cal., 424, 425-426.

Frisk *v.* Reigelman, 75 Wis., 499, 508.

S. C., 43 Nev., 1117, 1120.

In People *v.* Murback, 64 Cal., 369, a recital in a sentence condemning the defendant to death was amended by the Superior Court pending an appeal from the judgment. In sustaining the action of the lower court, the Supreme Court said (p. 372):

> "But the true statement, which was made by the court to the defendant, of the nature of the charge made against him, and of which he had been convicted, *although necessary as preliminary to pronouncing judgment* (sec. 1200 Pen. Code), was no part of the judgment pronounced; and a mistake made by the clerk in the entry of the statement on the minutes of the court would not invalidate the judgment. The mistake was, therefore, one which could be corrected at any time, while the record of the case was subject to the physical control of the

> court, so as to make the record speak the truth. The power of the court in that regard was not suspended by the appeal (Rousett *v.* Boyle, 45 Cal., 64; Sheldon *v.* Gann, 57 Cal., 40; Boyd *v.* Burrell, 60 Cal., 284)."
>
> People *v.* McNulty, 93 Cal., 427, 444.

Bearing in mind that the judgment in a criminal case is entered in the minutes of the court (Pen. Code, sec. 1207), and follows the failure of the defendant to show why sentence should not be pronounced against him (Pen. Code, secs. 1200-1201), which proceedings are entered upon the minutes, and constitute a part of the judgment-roll (Pen. Code, sec. 1207), the analogy between the case just quoted from and the case at bar is complete.

As was said in the case, *supra*, the recital calling on the accused to show cause, while important, is no part of the sentence pronounced by the court; so in the case at bar the recital showing notice required by section 1638, Code Civ. Pro., is no part of the judgment rendered; and, if omitted, may subsequently be supplied by amendment as in People *v.* Murback, *supra*.

In Fay *v.* Stubenrauch, 141 Cal., 573, Lorigan, J., says (p. 575):

> "Whenever it is apparent upon the face of the record, that the error to be corrected consists of a clerical misprision, the court has always inherent power to correct it (Estate of Schroeder, 46 Cal., 316; Fallon *v.* Brittan, 84 Cal., 511; San Joaquin L. and Water Co. *v.* West, 99 Cal., 347; Chicago Clock Co. *v.* Tobin, 123 Cal. 378).
>
> "Nor is the right of the lower court to amend suspended or impeded by an appeal, where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause, for the purposes of the appeal, but it does not lose jurisdiction of its records. These remain

within its physical control and custody, and as to the error suggested the court had a right, as well after the appeal is taken, as before, to amend it (Black on Judgments, sec. 162; Freeman on Judgments, sec. 73; People *v.* Murback, 64 Cal., 372)."

H.

SECTION 1638, CODE CIV. PRO., DOES NOT REQUIRE A RECORD OF THE PROOF OF NOTICE; A MERE RECITAL THAT PROOF WAS MADE WILL SUFFICE.

If the amendment obviates a mere clerical misprision, not involving the merits, it may be made at any time "on motion if deemed desirable for any purpose."

Chicago Clock Co. *v.* Tobin, 123 Cal., 377, 378.

Fallon *v.* Brittan, 84 Cal., 511, 513-514.

See Kaufman *v.* Shain, 111 Cal., 16, *passim*.

In 1 Black on Judgments, 1st ed., section 156, it is said:

> "If anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then the omission may be supplied by an amendment after the term. * * * For example, in the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and the amount of the original judgment against the defendant, but his failure to do so is a clerical error which may be corrected *nunc pro tunc* at a subsequent term."

The example referred to by the author is found in the case of Whorley *v.* Memphis & Charleston R. Co., 72 Ala., 20.

In People *v.* Barton, 88 Cal., 176, the court say (p. 178):

> "It is said that the judgment was illegally pronounced, because it does not appear from the judgment-roll that the defendant was informed, as he

> should have been, under section 1200 of the Penal Code, by the court, or under its direction, of the nature of the charge against him, or of his plea, or of the verdict. Conceding that it appears to have been held in People *v.* Murback, 64 Cal., 372, that these preliminary statements are necessary, and that they form no part of the judgment pronounced, yet it does not appear in the record that such statements were not made, and the presumption must be indulged that they were, unless the appellant has shown to the contrary, which he has not done."

So in the case at bar, if the decree does not *show* that proof of notice was made to the satisfaction of the court, yet it does not appear that such proof was not in fact made.

As has been said, the failure of the decree to recite that proof of notice was made to the satisfaction of the court does not render it void. Nor, if the decree were not an exhibit to the bill, would it be made so by mere allegation of such defect.

Eichhoff *v.* Eichhoff, 107 Cal., 42, 45-48.

The essential thing is the fact that notice was given for the time and in the manner directed by the Code. That the law was not fulfilled in that regard is not asserted by the complainant. The very contrary is admitted by the bill.

In the case of *In re* Eichhoff, 101 Cal., 600, at pages 604-605, Harrison, J., dealing with the question of presumption of jurisdiction, says:

> "Nor does this presumption of its jurisdiction to make the decision depend upon the existence of any record of the decision. The existence of the jurisdiction antedates its exercise, and does not depend upon any subsequent record thereof. The fact must be brought to its notice before the decision is made, and the decision must be made before there can be any record of its action. If it makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke

any presumption. It is only when the record is silent that the necessity for presumption arises" (citing cases).

McHatton *v.* Rhodes, 143 Cal., 275, 278-279. See Sanford *v.* Sanford, 26 Conn., 6, quoted in Crim *v.* Kessing, 89 Cal., 478, at page 490.

The omission of the recital from the decree does not constitute, in any sense, judicial error. It in no manner affects the jurisdiction of the court. The recital presupposes jurisdiction. Of the recital it may be said, as was said of the entry of a default in Sichler *v.* Look, 93 Cal., 600, at page 608, Mr. Justice Harrison delivering the opinion:

> "The entry of the default was not a step in acquiring jurisdiction, but an act of the court after jurisdiction had been acquired. When jurisdiction has once been acquired, it is not lost by a failure to preserve a record of the acts by which it was acquired, and the acts of the court in exercising its inherent power to amend its record, or to supply a lost record, will be presumed to have been properly exercised. It appears from the record of the judgment that at the date of this memorandum of default the service upon the appellant was complete, and that the time for his appearance had expired."

So here it affirmatively appears by the bill that the court had acquired jurisdiction to proceed to a hearing of the account and to the settlement and allowance thereof, and thereupon to distribute the estate, because notice of such hearing for the purposes mentioned had been given as prescribed by the Code.

In fine, since the recital of the proof of notice in the decree cannot be a condition precedent to the jurisdiction of the court to hear, settle and allow the account, for jurisdiction must antedate the power to make the recital (*In re* Eichhoff, 101 Cal., 600, 604), it would be illogical to contend that the failure to make the recital would destroy jurisdic-

tion already acquired and acted upon as evidenced by the decree, *rendered and entered,* annexed as an exhibit to the bill. It must be manifest, therefore, that the recital is not essential to the preservation of jurisdiction acquired; that its omission is not judicial error, but a mere clerical misprision, amendable at any time, if deemed requisite for any purpose; and that, consequently, in this instance, the decree should be considered amended upon the principle of the maxim invoked in a case where a judgment was treated (contrary to the fact) as duly entered, viz.:

> "THE LAW WILL PRESUME THAT TO HAVE BEEN DONE WHICH SHOULD HAVE BEEN DONE."
> McLeran *v.* McNamara, 55 Cal., 508, 512.

I.

THE PROVISION IN SECTION 1638, CODE CIV. PRO., FOR A RECITAL AND FOR ITS CONCLUSIVENESS IS OF NO ESSENTIAL EFFICACY TO A DECREE OTHERWISE REGULAR.

Section 1638 of the Code of Civil Procedure is in the same form as originally enacted, never having been amended. It reads as follows:

> "The account *must not* be allowed by the court until it *is* first proved that notice has been given as required by this chapter, and the decree *must* show that such proof was made to the satisfaction of the court, and *is* conclusive of the fact."

This section is in legal effect a re-enactment of section 238 of the act passed May 1, 1851 (Stats. 1851, 448), entitled "An act to regulate the settlement of the estates of deceased persons," which reads (p. 479):

> "The account *shall* not be allowed by the court until it *be* first proved that notice has been given as required by this chapter, and the *decree* shall show

> that such proof was made to the satisfaction of the court, and ***shall be*** conclusive of the fact."

A comparison of the two sections makes it manifest that the verbal changes made by the Code in no manner altered the meaning of the earlier section.

The legislature, in adopting section 238 of the probate act, had in view the fact that the jurisdiction of the probate courts and their mode of procedure being purely statutory, their decrees settling accounts might be open to collateral attack and *ex abundanti cautela*, provided that a recital of proof of notice should be conclusive of the fact recited.

It is evident, however, that such recital would not be conclusive on appeal.

> McClellan *v.* Downey, 63 Cal., 520, 522-523.

But in re-enacting section 238 of the probate act as section 1638 of the Code of Civil Procedure the legislature overlooked the act of 1858, to which, in speaking of the probate courts under the Constitution of 1849, Temple, J., referred as follows, in Burris *v.* Kennedy, 108 Cal., 331, at pages 337-338:

> "Such courts were said to have only a special and limited jurisdiction, and it was required that its records should show a strict compliance with the law directing and authorizing their action.
>
> "This rule was found intolerable, and in 1858 an act was passed directing that the same force and effect and the like presumption should attach to their proceedings as to the proceedings in the district courts.
>
> "This act has been held valid, and probate orders made since its passage can be collaterally attacked only on such grounds as would have been valid against like orders made by the district court (Irwin *v.* Scriber, 18 Cal., 499; Estate of Spriggs, 20 Cal., 121; Halleck *v.* Moss, 22 Cal., 266).
>
> "The amendment of 1862 still left the probate court a separate and special tribunal which did not have full probate jurisdiction (Bush *v.* Lindsey, 44 Cal., 121).

> "In the constitution of 1879 all this was changed. The jurisdiction was given to the highest court in the State having a general common-law jurisdiction. The same presumption must now attach to decrees in probate proceedings upon collateral attack as to judgments in cases at common law or in equity, and the sufficiency of the proceedings or petition will be tested by the same liberal rule which applies to the pleadings in an ordinary action upon such attack."

Since the act of 1858, *supra,* must be treated as *in pari materia* with the probate act of 1851, *supra,* it may be doubtful whether, after the passage of the former act, the absence of the recital required by section 238 of the latter act would have been fatal to the decree where in the record there was proof of the usual character, by affidavit (Schloss *v.* His Creditors, 21 Cal., 201, 203-204; Barrett *v.* Carney, 33 Cal., 530, 534-535), that notice had been given as directed by the probate act.

That section 238 of the probate act was not intended to preclude inquiry on appeal is evidenced by section 237 of said act (Stats. 1851, 478), which reads as follows:

> "The settlement of the account and the allowance thereof by the court, or *upon appeal,* shall be *conclusive* against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities shall cease, and in any action brought by any such person, the allowance and settlement of the account shall be deemed presumptive evidence of its correctness."

That section 237 of the probate act was re-enacted as section 1637 of the Code of Civil Procedure at the date of its adoption, in 1872, in the same form, except that the allowance and settlement of the account was made *"primary"* instead of *"presumptive"* evidence of its correctness.

But the important claim, viz., "The settlement of the account and the allowance thereof by the court, or *upon appeal* is *conclusive,* * * *" has never been amended.

From a comparison of sections 237 and 238 of the probate act of 1851 with their respective counterparts, sections 1637 and 1638 of the Code of Civil Procedure, and a consideration of McClellan *v.* Downey, 63 Cal., 520, 522-523, and the fact that since the act of 1858 the probate court and its successor, the superior court, must be accorded all the presumptions and intendments indulged in favor of courts of general jurisdiction, it becomes manifest that the requirement of a recital in the decree settling an account showing that proof of notice was made to the satisfaction of the court and the provision for its conclusive character play no important part in the form of the decree, even on a direct appeal, if the acquisition of jurisdiction otherwise appears by the record.

THESE CONSIDERATIONS END THE INQUIRY. THE DECREE IS VALID UPON ITS FACE.

J.

THE DECREE IS CONCLUSIVE.

Now, as to the conclusiveness of the decree. Section 1666, Code Civ. Pro., provides:

> "In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. *Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified* ON APPEAL."

There must be some point in the course of all judicial proceedings at which the rights of the parties involved be-

come absolutely fixed and placed beyond challenge. Unless this point is to be found in the entry of final judgment, it is not to be hoped for elsewhere. There should be no reagitation of matters which it is the very purpose of the judgment to definitely and finally determine.

Section 1908, Code Civ. Pro., provides:

> "In case of a judgment against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

This section applies directly to decrees of distribution.

Lynch *v.* Rooney, 112 Cal., 287.

William Hill Co. *v.* Lawler, 116 Cal., 361-362.

A decree of final distribution is *res judicata* and conclusive as to construction of will and the persons who are entitled to estate, and, even though erroneous, is not subject to collateral attack. The decree of final distribution determines that due notice was given; adjudges the will valid; construes its provisions; ascertains the persons entitled to the estate; distributes to each person entitled his share of the property; is not open to collateral attack upon any question relating to informalities, publications, postings, etc., as to notice and such decree could only have been questioned on appeal. It is the final determination of the rights of the parties entitled to the estate—it is conclusive as to the rights of heirs, legatees, devisees and *upon its entry their rights are thereafter to be measured by the terms of the decree, and not by the provisions of the will. It is immaterial whether the will was properly construed, the decree is conclusive.*

Goad *v.* Montgomery, 119 Cal., 557-8.

Matter of Trust of Trescony, 119 Cal., 570.

Goldtree *v.* Allison, 119 Cal., 345-6.

Crew *v.* Pratt, 119 Cal., 147, 151.

William Hill Co. *v.* Lawler, 116 Cal., 361.

Mulcahey *v.* Dow, 131 Cal., 77.

This question in relation to the will of Thomas H. Williams, the will attacked in the suit at bar, was before the Supreme Court of California in 1899. The action was for specific performance. One Marx had contracted to buy a piece of land distributed by the final decree of January 5, 1897, to Thomas H. Williams, Jr. He refused to complete the purchase because, by his construction of the will, he doubted the validity of the title. The court held that more than a year had elapsed since the decree of distribution was rendered; *that no appeal having been taken it is necessarily a judicial construction of the will and of the respective interests of the several distributees, and cannot be assailed collaterally; that there is no uncertainty in the decree itself, and to that alone the court is permitted to look.*

Marx *v.* Williams, 124 Cal., 22.

This determination was about five years before the present suit was instituted.

The decree is conclusive, not only as to the subject-matter in controversy, but upon all matters involved in the issues which might have been litigated and decided.

Crew *v.* Pratt, 119 Cal., 149.

In this case the action was brought against the heirs, devisees, legatees, etc., of O. C. Pratt to have it determined whether the trust provided by the will of deceased was valid or invalid. The estate of O. C. Pratt had been administered and distributed as provided by the will to the plaintiffs as trustees. The questions presented by the appeal were: 1. Was the trust created under the will of O. C. Pratt void under the doctrine enunciated in Estate of Walkerly, 108 Cal., 627? 2. If the first proposition be decided in the affirmative, then is the final decree of distribution such a conclusive adjudication of the validity of the trust that it cannot in this collateral inquiry be impeached by the appellants who were parties thereto?

The court held that the trust estate was squarely within the rule announced in Estate of Walkerly, *supra;* in violation of the law against the creation of perpetuities, and that it would have been held void upon direct appeal from the decree of distribution.

Upon the second question—whether the decree could be collaterally assailed, the court held that the distribution of an estate is a proceeding *in rem;* that jurisdiction is the power to hear and determine and give the judgment rendered; that a judgment is conclusive, not only as to the subject-matter in controversy, but upon all matters involved in the issues which might have been litigated and decided, the presumption being that all such issues were really met and decided; that probate courts have exclusive jurisdiction of the final distribution of the estates of decedents; that a decree of distribution of an estate, after due notice by the probate court, is conclusive upon a person who might have claimed that a share of the estate belonged to him; that the subject-matter upon which the court had been called to act was the settlement of the final account and distribution of the estate of O. C. Pratt, under his last will, to name the persons and the proportions or parts to which each was entitled; that, as incident to this duty, it devolved upon the court to determine whether or not there was a valid trust created by the will, and whether the respondents were lawfully created the trustees thereof; that, so far as the validity of the judgment of the court was concerned and against a collateral attack, it had the same abstract power to decide wrong as to decide right; and that, although the court had adjudged erroneously in holding the trust valid, yet as no appeal was taken, that determination was not open to collateral attack, but was final and conclusive.

In the matter of the Trust of Trescony, 119 Cal., 568, the facts were that a decree of distribution had been made distributing the estate according to the terms of the will of Albert Trescony—one-third of the estate to trustees upon certain trusts expressed in the will. Thereafter the trustees

filed an account of their management of the trust property, which was objected to on the ground that the trusts created by the will were void, as being in restraint of alienation. The principle involved was the same as that invoked here. The court said, page 570:

> "The decree of distribution was a judicial construction of the will of the decedent, and a determination by the court as well of the persons who were entitled to his estate as of the proportions or parts to which each of those persons were entitled, and was 'conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.' (Code of Civ. Pro. sec. 1666). * * * If, in making the decree, the court erred, either in matter of fact or in the application of the law to the facts before it, the decree unless appealed from, was a conclusive determination of the matters determined, and is not subject to collateral attack. * * * *Even if it be conceded that the trusts created by the will were in restraint of alienation, contrary to the provisions of the statute upon that subject, the decree of distribution is not for that reason to be disregarded.*"

Stubblefield *v.* McRaven, 43 Am. Decs., 502, 505.

Jennison *v.* Hapgood, 7 Pick., 1, 7; 19 Am. Decs., 258-9.

Silver *v.* Russell, 4 Cush., 513; 50 Am. Decs., 811, 812.

The decree of distribution, after due notice, is conclusive upon a person who might have claimed a share of the estate.

Crew *v.* Pratt, 119 Cal., 149.

Estate of Hinckley, 58 Cal., 457.

Greenwood *v.* Murray, 26 Minn., 279.

Ladd *v.* Weiskopf, 62 Minn., 29 (whether born or unborn).

Lynch *v.* Rooney, 112 Cal., 279.

In decreeing distribution the court necessarily inquired whether, and determined that, a valid trust had been created.

Goldtree *v.* Allison, 119 Cal., 345, 346.
Crew *v.* Pratt, 119 Cal., 150, 151.
Seymour *v.* McAvoy, 121 Cal., 444.
Mulcahey *v.* Dow, 131 Cal., 75, 76, 77.
More *v.* More, 133 Cal., 494, 495.

In Mulcahey *v.* Dow, 131 Cal., 76, the court says:

> "The all important question upon the hearing of a petition for a decree of distribution of the estate of an intestate is, who are the heirs entitled to take the estate? The identity of the heirs being determined, the proportion of each is not a difficult question to determine; for the law itself fixes those proportions; *and if the question of heirship is not settled by the decree of distribution, then nothing is settled by it, and the whole proceeding is a vain and useless thing.*"

The distribution of an estate being a proceeding *in rem*, the *res* being the estate which the personal representative brings before the court to receive directions for its final disposition, the notice given calls the world before the court; every person claiming an interest is required to present it to the court for its determination.

> "Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, subject only to be reversed, set aside or modified *on appeal.*"
>
> William Hill Co. *v.* Lawler, 116 Cal., 359.

At the oral argument in the lower court upon the demurrers to the bill, counsel argued that because it appears by the petition for and the decree of final distribution that the distributees agreed to distribution as actually made, there appears but a mere consent decree rendered without proof of sustaining facts. Consider that this is not a case *inter*

partes, but a proceeding *in rem* to determine the status of property and settle all claims thereto; reflect that there rested upon the court the imperative duty of construing the will and determining that it was valid before distribution could be made to its beneficiaries, the duty of ascertaining who were the persons entitled to receive as beneficiaries, identifying them as such, and adjudging their respective rights and proportionate shares before making its decree, and that by the terms of the decree, as disclosed by the exhibit attached to the bill, it is shown that the court's attention was directed to, and that it did actually construe the will; sum up the obligations imposed upon the court by the particular proceeding; reckon in the presumption that public officers perform their duties and that their official acts are regular, and no peg is left whereon to hang a hope that the consent decree theory will survive the impact of a single principle which controls the subject.

As Justice Harrison said, In the Matter of the Estate of Gustave Eichhoff, 101 Cal., 604:

> "But to assume that the court has determined this question without making any inquiry, or without any evidence before it, involves the presumption that it has neglected to perform its official duty, whereas a *presumption that an official duty has been neglected is never indulged.* The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy, that it had jurisdiction over the subject matter of the action, and of the defendant against whom the complaint was directed. Its jurisdiction does not exist by virtue of its mere decision that it has jurisdiction, as that would be reasoning in a circle. * * * Its determination upon this question is to be made upon evidence of some nature, and, whether this evidence is sufficient or insufficient to support its conclusion thereon, it has the jurisdiction to make the determination; and *if its conclusion is incorrect it is merely error, which can be reviewed only upon a direct appeal."*

There is no longer a will; it has been absorbed by and merged in the decree.

> "The decree of distribution is the instrument by virtue of which the plaintiffs have received the property in trust for the children, and their powers and duties in regard to that property are to be measured by the terms of this decree. For the purpose of enabling the Superior Court to distribute the estate of a testator in accordance with his will, it is required to consider the will as well as the estate left by him, and to construe its terms for the purpose of determining his intention, and make its order or decree of distribution in accordance with such construction. * * * *The judgment is the final determination of the rights of the parties to the proceeding; their rights are thereafter to be measured by the terms of the judgment, and not by the instrument.*"
>
> Goad *v.* Montgomery, 119 Cal., 551.

In Hiller *v.* Ladd, 80 Fed., 794 (affirmed by Court of Appeals, 85 Fed., 703; review denied by Supreme Court, 173 U. S., 703), the widow of the deceased sued the executor for an accounting, showing that the estate left by the testator was community property; that the will devised to her one-half of the estate; hence she was entitled to three-quarters thereof—one-half of the community property in her own right as surviving spouse and one-half of the other half under the terms of the will; that the executor procured an instrument of trust in his favor, under which he took possession, management and control of all her interest; that he fraudulently, and by means of threats of expensive litigation, induced her to consent to an agreement under which the will was construed to give her but one-half of the entire estate, including her community property, instead of one-half of the residue, excluding such property, and that he procured a distribution in accordance with such agreement during her absence in Europe. The bill charges other frauds, but as to

the consent decree, and the conclusiveness of the State probate jurisdiction, and the absence of equity jurisdiction, Judge Bellinger, on page 808, says:

> "The court is asked to decree against the writing by which Mrs. Hiller agreed to a construction of her husband's will by which she received one-half of the entire estate instead of three-fourths. Since by the laws of California she was entitled to one-half as community property, without the will, it is contended that, under the will, she should have one-half of the remaining half. This agreement was executed in May, 1872, and final distribution of the estate was had by order of the probate court of San Francisco in September of that year. If this decree of distribution is not final, still this court has no jurisdiction. It is a matter exclusively of probate jurisdiction, over which no court of equity has cognizance. This is settled by a long line of cases, including the case of *In re* Broderick's Will, 21 Wall., 503. The agreement was in effect a stipulation for the action of the probate court in making its decree. It is merely the means to the proceedings that have taken place, and neither those proceedings nor the subject to which they relate are cognizable here. And, besides this, in a matter within the equity jurisdiction this court would be bound by the decree of distribution that has been made. It certainly will not be contended that this court can cancel, set aside, or modify the decree of distribution made by the probate court of San Francisco. No more can it compel an account of what has been received under that distribution, for that would be to annul the decree of probate by indirection, and make a decree of distribution of its own."

Question 3. Have the defendants been guilty of such fraud as will warrant a court of equity in setting aside the decree of distribution, or in holding them as trustees for the complainant?

A.

THIS IS A COLLATERAL ATTACK.

When we speak of a direct attack upon a judgment we usually refer to some proceeding in the action in which it was rendered, either by a motion before the court which rendered it, or by an appeal therefrom; whereas, an attempt to impeach the judgment by matters *dehors* the record is a collateral attack.

Lynch *v.* Rooney, 112 Cal., 279.
Parsons *v.* Weis, 77 Pac., 1009.
Eichhoff *v.* Eichhoff, 107 Cal., 42.
Gruwell *v.* Seybolt, 82 Cal., 10.
Phelan *v.* Smith, 100 Cal., 171.
Kearney *v.* Kearney, 72 Cal., 591, 595.
Hanley *v.* Hanley, 114 Cal., 692.
William Hill Co. *v.* Lawler, 116 Cal., 394.
Mulcahey *v.* Dow, 131 Cal., 73, 77-78.

B.

THE BILL DOES NOT SHOW EXTRINSIC FRAUD.

If there is any merit in the complainant's claim of fraud, its legal foundation must be found in section 2224 Civil Code of Cal.:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other

> wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it,"

and the bill must be treated as one in equity to enforce a trust by reason of fraud extrinsic to the merits involved in the proceeding for distribution, as, keeping the unsuccessful party away from court by a false promise of compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client.

Pico *v.* Cohn, 91 Cal., 129, 133-4.
Langdon *v.* Blackburn, 109 Cal., 26, 27.
Hanley *v.* Hanley, 114 Cal., 690.
Mulcahey *v* Dow, 131 Cal., 74, 77-78.

There has been no definition which we have been able to find, of what constitutes extrinsic fraud, which is at once perspicuous, comprehensive and satisfactory; but there has been in California a gradual process of judicial inclusion and exclusion, as the cases presented for determination required, with the reasoning on which each decision was founded.

We think we may safely affirm that no case can be found declaring the fraud extrinsic where it was committed in relation to any issue made by the proceedings under review.

In Haddock *v.* Haddock 201 U. S., 627; 50 L. Ed., 893, the court says:

> "The rule is well settled that while a judgment or decree may sometimes be impeached for fraud, it can only be for fraud extrinsic to the cause,—as, that the judgment was collusively obtained to defraud some other person; and that it cannot be impeached by either of the parties thereto by reason of false testimony given at the time, or which must have been

given to establish the plaintiff's cause, or even by perjury of one of the parties thereto."

Christmas *v.* Russell, 5 Wall., 290; 18 L. Ed., 475.
U. S. *v.* Throckmorton, 98 U. S., 61; 25 L. Ed., 93.
Simms *v.* Slacum, 3 Cranch, 300; 2 L. Ed., 446.
Ammidon *v.* Smith, 1 Wheat, 447; 4 L. Ed., 132.
Smith *v.* Lewis, 3 Johns., 157; 3 Am. Dec., 469.
Marriot *v.* Hampton, 7 T. R., 469.
Demerit *v.* Lyford, 27 N. H., 541, 546.
Peck *v.* Woodbridge, 3 Day, 30.
Dilling *v.* Murray, 6 Ind., 324; 63 Am. Dec., 385.
Homer *v.* Fish, 1 Pick., 435; 11 Am. Dec., 218.
Lewis *v.* Rogers, 16 Pa., 18.
Sidensparker *v.* Sidensparker, 52 Me., 481; 83 Am. Dec., 527.
Boston & W. R. Corp. *v.* Sparhawk, 1 Allen, 448; 79 Am. Decs., 750.
Damport *v.* Sympson, Cro. Eliz., pt. 2, p. 520.
Mason *v.* Messenger, 17 Iowa, 261, 272.
Walker *v.* Ames, 2 Cow., 428.
White *v.* Merritt, 7 N. Y., 352; Am. Decs., 527.

In an application for distribution the direct question presented to the court is, Who are the heirs or beneficiaries? "And this marks the important distinction between the present case and the case of Wickersham *v.* Comerford," 96 Cal., 433, as was said by Justice De Haven in Fealy *v.* Fealy, 104 Cal., 361, a distinction approved in Hanley *v.* Hanley, 114 Cal., 694. In both these cases the true rule is declared to be that an action will not lie to vacate a decree setting apart a homestead to a widow for alleged fraud, consisting in falsely testifying that the property was community property, be-

cause that was the very question litigated in the probate proceedings which became *res judicata* by the court's order.

Gruwell *v.* Seybolt, 82 Cal., 113, 114.
Langdon *v.* Blackburn, 109 Cal., 26, 27.

The complainant knew, was bound to know, that the statute imposed upon the *court* the duty of construing the will, identifying the beneficiaries thereunder, and distributing to each his share of the estate.

In Mulcahey *v.* Dow, 131 Cal., 76, the court says:

> "In treating of decrees of distribution, section 1666 of the Code of Civil Procedure reads:
>
> " 'In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled. * * * Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal.'
>
> *"The all-important question upon the hearing of a petition for a decree of distribution of the estate of an intestate, is, who are the heirs entitled to take the estate?* The identity of the heirs being determined, the proportion of each is not a difficult question to determine; for the law itself settles those proportions; and if the question of heirship is not settled by the decree of distribution, then nothing is settled by it, and the whole proceeding is a vain and useless thing, and this section of the Code declares in terms that the decree, subject to appeal, is conclusive as to the rights of heirs, legatees and devisees."

In Mulcahey *v.* Dow the intestate left a widow here, and a sister and nephews in other States. In due time and after due notice, distribution was made to the widow, who was sued as an involuntary trustee because she did not inform the plaintiffs of the death of her husband. The court held that no legal duty devolved upon her to furnish them with that information and that her failure in that respect was immaterial; that the proceedings being *in rem,*

the notices called the world before the court, which acquired jurisdiction over all persons to determine their rights in the estate.

In William Hill Co. *v.* Lawler, 116 Cal., 359, the court, speaking through Mr. Justice Harrison, said:

> *"The distribution of the estate includes the determination of the persons who, by law, are entitled thereto,* and also the proportions or parts to which each of these persons is entitled. A proceeding for distribution is in the nature of a proceeding *in rem,* the *res* being the estate which is in the hands of the executor, under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him, if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court (Estate of Griffith, 84 Cal., 107; Daly *v.* Pennie, 86 Cal., 552; 21 Am. St. Rep., 61)."
>
> Crew *v.* Platt, 119 Cal., 140.
> Goldtree *v.* Allison, 119 Cal., 344.

It is the unquestioned doctrine of the cases that a judgment cannot be impeached collaterally on the ground that false testimony was given at the trial, on which testimony the judgment was rendered (Pico *v.* Cohn, 91 Cal., 133, 134), and it is obvious that there is no difference in principle whether the fraud charged consists in making false statements in the petition for distribution, or giving false testimony in support of the issues made by the petition.

The case of Lynch *v.* Rooney, 112 Cal., 279, is not distinguishable in principle from this case. There it was sought to declare the distributee an involuntary trustee on the ground of mistake, under section 2224, Civil Code (ante).

It is evident that this section, relating to involuntary trustees, places mistake and fraud in the same category, and so it is expressly held in Mulcahey *v.* Dow, 131 Cal., 75, 76.

The court says (112 Cal., 286):

> "It is substantially claimed that upon Mary Rooney's evidence given upon the hearing of the application for the decree of distribution, the court found as a fact that her mother was entitled to the whole estate as the only heir; that Mary Rooney was mistaken as to the fact of her mother being the only heir, inasmuch as there were other heirs, and that by reason of her mistake in so testifying, the court rendered a wrong judgment; and that thereby Mary Rooney gained the entire estate by a mistake in fact, and should be declared an involuntary trustee of two-thirds thereof, as provided by the terms of the section just quoted (sec. 2224, C. C.).
>
> "It is insisted that the intervenors, in asking this relief, are not attacking the decree of distribution, but are seeking relief thereunder. Many cases are cited to support this contention, but they fall short of the mark, and present no question similar to the one here involved. The court, in hearing the petition for the distribution of the estate of Bryan Lynch, deceased, took evidence as to who were the heirs of his estate, upon legal and proper notice to the entire world, entitled to take the same, and thereupon made a finding of fact that Catherine Clark was entitled to the entire estate. That decree never has been modified, nor even assailed, and, so far as any collateral attack is concerned, it must stand forever as binding and conclusive upon the question of heirship. Whatever counsel may say as recognizing the validity of the decree, and claiming under it, is not strictly true, for that decree declares as a fact that Catherine Clark is the only heir of Bryan Lynch; and to give the intervenors the relief here sought that finding must

be first set aside as untrue, and that cannot be done in this action. If such a thing could be done, the stability of judgments and decrees would be a thing of the past. Decrees of distribution would be as unstable as the sands, for omitted heirs from such decrees would be seeking to have involuntary trusts declared thereon at most inopportune times, and in direct opposition to the law as declared by section 1908 of the Code of Civil Procedure pertaining to the conclusiveness and finality of judgments."

Quirk *v.* Rooney, 130 Cal., 505.

Counsel for complainants misconceive the legal phase of the question where they assume that it is the duty of an heir to disclose, if known, the names of known or possible claimants of the estate. There can be no fraudulent concealment of a fact unless there is an obligation to disclose.

In re Griffith, 84 Cal., 112, 113.
Wickersham *v.* Comerford, 104 Cal., 494, 495.
Mulcahey *v.* Dow, 131 Cal., 78.
Royce *v.* Hampton, 16 Nev., 25.
Lynch *v.* Rooney, 112 Cal., 279.

In Mulcahey *v.* Dow the widow of an intestate was sued as an involuntary trustee because she did not inform the plaintiffs of the death of her husband. The court held that no legal duty devolved upon her to furnish them with that information and that her failure in that respect was immaterial.

In re Griffith holds that the failure of a party to introduce evidence, known to him to exist, tending to overthrow his case, is not ground for relief in equity.

In Wickersham *v.* Comerford it is held that a fraudulent concealment cannot be charged unless there is an obligation to disclose, and that the mere omission to make mention of a fact, in the absense of any knowledge that it is requisite to make such mention, falls far short of fraud.

In Royce *v.* Hampton, Judge Hawley held that when the

petitioner claims to be the sole heir of the estate and regularly pursues the course required by the statute in giving notice, he is not guilty of fraud upon the court because he does not state the names of parties who claim to be heirs of the estate.

This disposes of all the statements in the bill relating to the questions of testamentary construction and of heirship disclosed by the petitions of some of these defendants to the probate court. Whatever was said in those respects was and could only have been touching the issues presented by the petition for final distribution, and necessarily passed upon by the court, and therefore intrinsic to the merits. Upon no such statement or evidence can extrinsic fraud be predicated.

Now, as to the alleged fraud or mistake attributed to Judge Williams:

It is stated by the bill that a few days after the death of his wife, which was on October 3rd, 1893, the complainant was in San Francisco with her remains for interment. While here, as said by the bill: "George E. Williams declared to your orator that his said wife had no interest in the estate of her deceased father or property of any kind or character. * * * That she had left no property or estate whatever"; that complainant believed and relied upon said representations, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife, and being so induced he did thereafter abstain from any such inquiry, and he knew nothing at all of the fact that he was entitled to any property as heir-at-law until November, 1903, when in New York his attention was called to the matter by a stranger.

By amendment to his original bill the complainant further alleges that Judge Williams was a lawyer of many years' practice and of great experience, who had been a judge of a Superior Court of this State; that complainant knew nothing about the will of General Williams. *"All he knew was that his wife during their married life was receiv-*

ing money from her father's estate in California" (Trans., 69).

Now, taking the allegations of the bill at their face value, it is submitted:

That there was no "confidential relation" or "fiduciary relation" in this case between Judge Williams and the complainant; there were no benefits to be secured by the executor from the complainant by preventing him from obtaining a distributive share of the estate. A general allegation of unlimited confidence in Judge Williams does not state a confidential or fiduciary relation (Robbins *v.* Hope, 57 Cal., 493); the fact that Judge Williams was a lawyer did not establish the relation of attorney and client, and thus enable the attorney to obtain undue advantage, bargain or gratuity from or through any right of the client; there were no negotiations or contractual relations between the two relating to the properties of the estate, or of any character whatever; there is nothing to suggest any marked influence, ascendency or other advantage over the complainant; the relation of trustee and beneficiary of an express trust in this regard, in which the trustee was obtaining any profit or advantage to himself in managing the concerns of the *cestui que trust,* did not exist, nor did any relation of trust or confidence exist in which Judge Williams was to derive a personal benefit from the management of the assets or transaction of the business of the estate. In short, even if the complainant had been a beneficiary under the will, Judge Williams owed no duty to him that he did not equally owe to the other beneficiaries, and no obligation resting upon him could possibly include the duty of construing the will of General Williams. The complainant knew, was bound to know, that the statute (section 1666, Code Civ. Pro.) imposed upon the ***court*** the duty of construing the will, identifying the beneficiaries and distributing to each his share of the estate. The complainant knew that Judge Williams was executor; that he was appointed to execute the provisions of the will,

and it is the fact that by those provisions complainant's wife's interest in the estate ended with her death.

Estate of Willey, 140 Cal., 238, 241-242.

Again, if any peculiar relation of trust or confidence existed, and Judge Williams availed himself of such trust to mislead complainant, that fact does not appear by the bill. On the contrary, counsel for complainant admit that Judge Williams was entirely honest in the statement of his conclusions. So this is not one of those rare cases where one of the parties to a transaction is ignorant of the law, and the other party, knowing him to be so, and knowing the law, takes advantage of such ignorance to mislead him by a false statement of the law, and thus secures an advantage to himself.

To constitute fraud, it is not only necessary that the representation should be untrue, but also that that party making it should know it to be so at the time it was made. If, then, Judge Williams actually believed that complainant's wife's interest in her father's estate ended with her death, his representation to that effect, although wrong, yet having been made in good faith, would not amount to fraud. The legal effect of the provisions of the will depended upon its construction by the court, and if Judge Williams honestly believed the representation he made in regard to the title of complainant's wife, he could not have made it for the purpose of defrauding the complainant.

> "The most that can be said is that the attorney was mistaken in his view of the law."
>
> Wickersham *v.* Comerford, 104 Cal., 495-6.

Scienter is an essential element in the sort of fraud charged.

Campbell *v.* Hillman (Ky.) 61 Am. Dec., 195, 197.
Fooks *v.* Waples, 25 Am. Dec., 64.
Miller *v.* Howell, 32 Am. Dec., 339, 341.

It will be observed that there was no concealment or attempt to prevent inquiry, on the part of Judge Williams. He simply stated his opinion. The misrepresentation complained of was as to complainant's title, and herein the rule, in all such cases as this, that those who claim an interest in property must be charged with knowledge of its status, and the vicissitudes to which it is subject, and that "a person is conclusively presumed to know the state of his own title to real property."

Certainly no artifice was used to prevent inquiry.

Whether complainant inherited through his deceased wife depended, of course, upon the construction of General Williams' will. If that will is valid, complainant is a stranger to the estate; if invalid, he inherited through his wife. The fact, then, was not peculiarly within the knowledge of Judge Williams. His source of information was the will. Upon its construction depended the solution of complainant's inquiry. He was face to face with the source of information and knowledge, the will, the probate records, the beneficiaries—all were immediately at hand. The rule is that a man cannot be voluntarily blind as to facts concerning which false representations are made, where the parties have equal present opportunity and means to discover the truth. The very fact that Judge Williams stated that complainant's wife had no interest in the estate, *when she had been drawing an income therefrom all the while complainant was her husband*, was in itself enough to create surprise, arouse doubt and provoke investigation in the mind and by a prudent person, and rendered complainant's failure to obtain independent information and advice, inexcusable negligence.

Champion *v.* Woods, 79 Cal., 17.

> "Natural curiosity, as well as business prudence, would have compelled him to make the inquiry, and his failure to make it was inexcusable negligence."
>
> Simpson *v.* Dalziel, 135 Cal., 603.

In any event, what Judge Williams said was, and could only have been, his opinion upon a written instrument filed, recorded and open to the inspection of the complainant, his attorneys, and all the world.

In Sturm *v.* Boker, 150 U. S., 312, it is said:

> "Both the defendants and the insurance company had the written contracts before them, and were presumed as a matter of law to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law where the facts were equally well known to both parties, such statements of opinion do not operate as an estoppel. If he had said in express terms that by that contract he was responsible for the loss, it would have been, under the circumstances, only an expression of opinion as to the law of the contract, and not a declaration or admission of a fact such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."
>
> See also Mountain Lake, etc., *v.* Shartzer, 83 Md., 14; 34 Atl., 536.

In Mountain Lake Park Assn. of Garrett County *v.* Shartzer (Md.) 34 Alt., 536, the court says, page 537:

> "Upon the question of equitable estoppel, relied upon by the plaintiff, we need only say that it was essential for its application with respect to the title of real property that the party claiming to have been influenced by the evidence or declaration of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge; where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

This is the principle involved, and it applies to all cases "where the condition of the title is known to both parties, or "both have the same means of ascertaining the truth."

The rule may be thus stated: Where the statement is not resolvable into a statement of fact, as distinguished from a statement of opinion or of law, and does not amount to a contract, the party making it is not bound, nor is fraud imputable.

However, assuming, *pro hac vice,* the truth of everything or anything contended for in relation to the statements alleged to have been made by Judge Williams to complainant, the whole matter is immaterial. The distributees do not take through Judge Williams; he was not their agent—certainly not authorized to deal with complainant, or construe the will, or make any representations concerning title. The doctrine of privity is applicable. The alleged declarations of Judge Williams would be inadmissible as evidence. They are irrelevant and immaterial as parts of the bill.

Can anything be clearer than that *we* cannot be bound by the views of Judge Williams upon a question of law, or held responsible for their expression? If the complainant was told by the executor that his wife had no property in General Williams' estate, he was only told by the executor that he so read and understood the will. Certainly the charge of fraud cannot be predicated upon any such general conclusion.

Question 4. Has the Federal court any jurisdiction to construe or to determine any question affecting the validity of the will?

JURISDICTION OF THE FEDERAL COURT.

It is submitted that while this suit is in the guise of a bill in equity to declare a trust, the real purpose and object of the proceeding is to obtain from this court a review of the construction of a will made by a court of general and competent jurisdiction, vested with original and exclusive power

of performing this function by the Constitution of the State of California.

It needs no authority to support the proposition that the question of jurisdiction, and the propriety of its exercise, will be looked into, and if it is found that the suit is but a makeshift to vest the court with power, while the real object is to accomplish something beyond the jurisdiction, the proceeding will not be entertained.

Here the attention of the court is called to the fact that no collateral or extrinsic fraud is pleaded in the bill.

Blythe *v.* Hinckley, 84 Fed., 246, was a suit, in form, to recover from Florence Hinckley certain properties vested in her by decree of final distribution, made by a Superior Court of California. It was a direct application to a federal court to cancel, vacate and set aside the decree of the Superior Court, and the suit was instituted upon the theory that the judgment of the Superior Court was void, which is in line with the contention of the complainant here.

A motion was filed to dismiss the action upon the ground that the court had no jurisdiction, and the question submitted was whether or not the real heirs-at-law of the decedent in that case had been deprived of their property by this alleged void judgment, and in delivering the opinion of the court Circuit Judge Morrow said (page 255):

> "The whole question of inheritance has, by judicial acquiescence, been left to the jurisdiction of the States, and has become a general rule of property right. This being so, it follows that the jurisdiction of the Circuit Court cannot be maintained, because the State court, in the exercise of its general jurisdiction, determined the eligibility of the defendant to inherit under the laws of the State.
>
> "The other propositions contended for by the complainants are, for the same reason, deemed, insufficient to take this case out of the general rule that, after a court of a State, with full jurisdiction over property in its possession, has finally determined all

> rights to that property, a court of the United States will not entertain jurisdiction to annul such decree, and disturb rights once definitely determined."

The court refused to entertain the bill upon the ground that if the plaintiff had any remedy at all, irrespective of the foregoing proposition, that it was by an action of ejectment.

The position we advance here is that the present suit is but an attempt to set aside the judgment of the Superior Court for irregularity or error at law, and upon grounds for which, if error was committed, the Supreme Court of the State of California had corrective power upon appeal, and in such cases we maintain the federal court is without jurisdiction.

In the case of Barrow, admr., *v.* Goodrich, 98 U. S., 80; 25 L. Ed., 407, the court said:

> "If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, * * * the United States courts could not properly entertain jurisdiction of the case. Otherwise the Circuit Courts of the United States would become invested with power to control the proceedings of the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible."

This means that in cases where the result would amount to a mere revision of errors and irregularities, or of the correctness or legality of a judgment by a State court, the federal courts have no jurisdiction.

As was said by District Judge Priest, in the case of Oakley *v.* Taylor, 64 Fed., 245, 249, upon the question of jurisdiction:

> "Where there exists a substantial doubt as to the jurisdiction of the federal courts, the controversy should be declined; and *especially is this true where*

> *its tendency would be to remove from domestic tribunals those matters of domestic administration with a view to which they are especially constructed and equipped."*

Upon the question of federal jurisdiction this case is in the situation and controlled by the principles which governed the determination of O'Callaghan *v.* O'Brien, 199 U. S., 89; 50 L. Ed., 101, where Mr. Justice White, delivering the opinion of the court, said (U. S., 110; L. Ed., 111):

> "An analysis of the cases, in our opinion, clearly establishes the following:
>
> "First. That, as the authority to make wills is derived from the State, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of the courts of the United States.
>
> "Section. That where a State law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes,* the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other States or aliens, will enforce such remedies."

After fixing the significance of the expression "action or suit *inter partes,*" the opinion continues (U. S., 111-113; L. Ed., 111-112):

> "There is no pretense of any custom in the State of Washington beyond the scope of authority conferred upon the courts of the State by the laws thereof. The question, therefore, reduces itself to a narrow compass; that is, what remedies do the laws of Washington create for the purpose of the probate of wills and the revocation of a probate, and are those remedies exclusively probate in their character or necessarily merely ancillary thereto, or do they confer upon the State courts general legal or equitable authority on the subject merely because of the exist-

> ence of a controversy? That is to say, is a will contest under the laws of Washington an ordinary action or suit between parties or a special probate proceeding directly ancillary to or concerning the probate of the will?"

The clause of the constitution of Washington vesting the Superior Court with original jurisdiction "of all matters of probate," and various statutory provisions to supply the machinery to effectuate such jurisdiction—among others certain sections relating to proceedings to contest a will after admission to probate, are then quoted or referred to, and the opinion proceeds (U. S., 114; L. Ed., 112):

> "We are of opinion that the sections in question authorize a proceeding for contest only before the court which has admitted the will to probate or rejected the application made for probate, and that the authority thus conferred concerning the contest is an essential part of the probate procedure created by the laws of Washington, and does not, therefore, cause a contest, when filed, to become an ordinary suit between parties. * * * The context of the legislation in question also clearly establishes that the authorized proceeding is but supplementary to, and a continuation of, the original proceeding in probate. * * * Moreover, it is evident that the statute contemplates that the court, when acting on a contest filed under its provisions, is not confined to the exertion of powers which would properly be exerted in an ordinary suit *inter partes*, since the statute causes a decree in favor of the petitioner, revoking a will already admitted to probate, to inure not only to the benefit of the particular contestant, but to be operative as to the whole world. This follows from the provision of the statute, saying that if the court finds in favor of the petitioner who sought the revocation of a probate 'the will and the probate thereof shall be annulled and revoked' * * *
>
> "It follows that as the Circuit Court of the United States had no jurisdiction to admit a will to probate, or to entertain a pure probate proceeding, and as

> the remedy afforded by the laws of Washington to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit *inter partes*, the circuit court of appeals correctly decided that the circuit court, although there was diversity of citizenship, was without jurisdiction of the cause so far as the bill sought a declaration of the nonexistence of a will, and the consequent nullity of the probate."

We have quoted thus freely from the O'Callaghan case because it seems to us decisive of the case at bar upon the question of jurisdiction. There is no law of California by which a suit in equity may be maintained to set aside the probate of a will, but by the constitution and statutes of that State provision is expressly made for the contest, within one year of any will theretofore admitted to probate, for any cause affecting the validity of the will. Such contest is strictly a probate proceeding and the forum for its determination is the department of the Superior Court having jurisdiction of the estate, and such contest is not a suit between parties within the general jurisdiction of that court.

By section 5 of article VI of the Constitution of California "the Superior Court shall have original jurisdiction * * * of all matters of probate."

By section 1294 of the Code of Civil Procedure it is provided:

> "Wills must be proved, and letters testamentary or of administration granted:
>
> "1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.
>
> "2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the State.
>
> "3. In the county in which any part of the estate may be, the decedent having died out of the State, and not resident thereof at the time of his death.
>
> "4. In the county in which any part of the estate may be, the decedent not being a resident of the State,

and not leaving estate in the county in which he died.

"5. In all other cases, in the county where application for letters is first made."

Various provisions follow, concerning the production of, and petition for the probate of wills, notices of the hearing by publication and posting, and by mailing to executors and heirs, proof of notice, etc., and among them section 1305, which provides:

> "A judge of the Superior Court may at any time make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses."

Section 1307 is as follows:

> "Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose," &c.

The next section provides how a will may be admitted to probate when there is no contest.

Section 1312 provides that:

> "If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner, and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three of this Code. If the demurrer is sustained the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issue of fact thus raised, involving:
>
> "1. The competency of the decedent to make a last will and testament;

"2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;

"3. The due execution and attestation of the will by the decedent or subscribing witnesses; or

"4. Any other questions substantially affecting the validity of the will;

must, on request of either party in writing (filed three days prior to the day set for hearing), be tried by a jury. If no jury is demanded the court must try and determine the issues joined. On the trial the contestant is plaintiff and the petitioner is defendant."

Section 1314 reads:

"The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case the proofs of the subscribing witnesses must be reduced to writing. If the will is submitted to probate the judgment, will, and proofs must be recorded."

Subsequent sections provide for the preservation of the testimony for future contests, the certification of proof and facts found when the will is admitted to probate, the recordation of the will and certificate, the probate of foreign wills, and then,

By section 1327, it is provided that:

"When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked."

By section 1328 it is declared that:

"Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators,

with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the State, so far as known to the petitioners; or to their guardians, if any of them are minors; or to their personal representatives, if any of them are dead, requiring them to appear before the court on some day of a regular term, therein specified, to show cause why the probate of the will should not be revoked."

Section 1330 reads, in part:

"If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked."

Section 1331 declares:

"Upon the revocation being made, the powers of the executor or administrator with the will annexed, must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation."

Section 1333 provides that:

"If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed."

It is submitted that the case at bar is fully within the rule laid down in O'Callaghan *v.* O'Brien, and that the Federal court is without jurisdiction to construe the will of General Williams, for the reason that diverse citizenship does not give jurisdiction to a Federal court to determine any question relating to the validity of a will which has been probated and construed by, and merged in the decree of, a State court, of original and exclusive jurisdiction in all matters of

probate, with ample powers of process and investigation, as well as to check and revise proceedings tainted with fraud, mistake, or illegality, conferred by laws which afford ample opportunities to contest the validity of a will either before or after its admission to probate, by special proceedings which supplement, and are within, and are a mere continuation of, the original probate proceedings, and are an essential part of the probate procedure of the State; and which do not, in any sense, constitute an ordinary or independent controversy *inter partes,* but are in the nature of proceedings *in rem,* and, if successful, operative as to the whole world.

In Toland *v.* Earl, 129 Cal., 148, the court says, on page 151:

> "The legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a Minute Code has been provided, through which every purpose for which resort was formerly had to Courts of Equity is attained."

And on page 152:

> "But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes not only the law of the personalty, but also of the real estate. In other jurisdictions this decree is also held to be conclusive. But generally it concerns only personal property, and the power to make it does not involve the power to construe trusts in land created by the will. Here the probate court not only may, but should, and often must, construe the trusts created by the will. After the decree is made the will practically drops out of

existence. The law of the estate is the decree and not the will, and, as I have said, all deraignments of title are through it" (Goad *v.* Montgomery, 119 Cal., 552).

"The proceeding differs much from the system of administration where the personal property goes to the personal representative and the land to the heir. Here the relation of the probate court to the executor is much more analogous to the relation of a court to its receiver. And here, too, the entire probate proceeding from the grant of administration, or the probate of a will, is calculated to give notice to the heirs of a decedent, and special notice is required to be given of the time when distribution will be made, where all interested can be heard. The distribution is declared to be conclusive upon the whole world."

In the case of Fouvergne *v.* Municipality, etc., 59 U. S., 470, 15 Law Ed., 399, it was held:

"The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed as conclusive of the validity and contents of a will. * * * If any error was committed in allowing the probate, the remedy is in the State courts according to their appropriate means of procedure."

The case of Ellis *v.* Davis, 4 Wood, 6-16, was in form an action to set aside the probate of a will, and for an accounting, and the court said:

"I am therefore of opinion that this court has no jurisdiction of so much of the case presented by the bill as seeks to annul the will of Mrs. Dorsey, and set aside the probate thereof. This is decisive of the whole case, for the right of the complainants to an account from the defendant depends upon the success of their effort to set aside this will of Mrs. Dorsey and the probate thereof. As long as the decree of the Second District Court admitting the will to probate and recognizing the defendant as the sole legatee remains

> in force, the complainants have no standing which authorizes them to demand an account of the plaintiff.'

Let us apply this language to the case at bar. The attempt of the complainant by his bill is to set aside the decree of distribution in the estate of the deceased Williams, and so long as this judgment stands unimpeached, and Thomas H. Williams, Jr., and Frank Hansford Johnson under its provisions remain the sole legatees of the deceased Williams, we assert complainant has no standing which authorizes him to demand an account from the respondents.

This suit is but one to determine the validity of a certain provision of a will, and the Federal court has no jurisdiction of the subject matter.

In re Cilley, 58 Fed., 982.
Copeland *v.* Bruning, 72 Fed., 8.
Ellis *v.* Davis, 109 U. S., 485; 27 Law Ed., 1006.

It is a familiar maxim "that equity looks to the intent, rather than to the form," and certainly if the court will look at the intent of the complainant in this case, rather than to the form of his bill, the conclusion must be reached that his effort is an attempt to foist upon this court a matter for its determination over which it is without jurisdiction.

In the present case we have before us the administration of an estate where the will was admitted to probate in 1886, which was affirmatively acted upon and acquiesced in by the complainant's predecessor in interest, where the decree of final distribution was rendered in 1897, fully seven years prior to the institution of this suit, and complainant, if successful, will impose upon this court the duty to construe a will, which in the State forum, by virtue of the decisions heretofore cited, has long since been consigned to oblivion, and the effect will be to extend to the complainant, because of his non-residence within the State, a right which could not be claimed by any denizen of the State of California.

For this court to entertain jurisdiction for that purpose would be, to paraphrase the language of the Supreme Court in Security Trust Co. *v.* Black River National Bank, 187 U. S., 211, 47 L. Ed., 155, to nullify the administration laws of the State by giving the claimants who are out of the State, non-residents thereof, greater privileges in matters relating to distribution of estates than residents of the State enjoy.

> "Such a result would place the judgments of the Federal court on a higher grade than judgments of the State court, and would necessarily produce conflict and render the State powerless in a matter over which it has full control."

In presenting this question we are not unmindful of those exceptional cases holding that a Federal court upon a proper bill upon peculiar facts has jurisdiction of a suit by an heir-at-law for relief to which he is properly entitled, but the bill under consideration does not make such a case.

Jurisdiction has been tersely defined as "the right to hear and determine." That right was vested in and exercised by a Superior Court of California in this matter, and we feel safe in asserting that this court, upon this bill, has no right to determine that the decree of final distribution made by the State court is other than a valid decree or to undertake the construction of the will upon which that decree was based.

Should we concede, *pro hac vice,* that this bill is what it pretends to be, and is not colored for the purpose of avoiding this question of jurisdiction, and that the suit is one by an heir for relief relative to his interest in the estate of a deceased person, this complainant can obtain no relief in this forum.

In considering this last assertion attention is to be paid to the distinction between "equity jurisprudence" and "equity jurisdiction," and the one is essentially different from the other.

It is recognized that equity jurisdiction may exist over a case, although it is one in which the principles of equity jurisprudence forbid any relief to be granted or any right to be maintained. And what has been heretofore said makes it clear that even assuming the court possesses jurisdiction of the case at bar, the principles of equity jurisprudence forbid the complainant any relief at its hands.

Position of the Defendants Jennie R. and Georgie E. Williams.

It is not contended by the complainant that the entire will of Thomas H. Williams, deceased, is void; nor is there any pretension that the same was conceived in iniquity, or that George E. Williams or Jennie R. or Georgie E. Williams were parties to any fraud save and except as to the construction of item 4 of the will, if it be conceded for the purposes of the present matter that the bill contains sufficient allegations of fraud as to that particular item, or the judgment or decree of the court thereon.

By the will of the testator, attached to the complaint, George E. Williams was made the executor thereof. He acted as such from the year 1886 to the year 1897, when the final decree of distribution was entered, a period of nearly eleven years.

By item 10 of the will the executor is invested with certain powers and authority over a vast estate.

By item 12 of the will the testator directs that the court having jurisdiction shall make unto George E. Williams a fair and liberal allowance for all services without reference to statutory or other fees.

By the decree of distribution it was expressly found that the executor had rendered great, extraordinary, and valuable services to the estate, and had performed all the labors thereof, and therefore in view of the provision of the will, the Superior Court ordered and decreed that George E. Williams be allowed the sum of one hundred thousand dollars as com-

pensation for his services as executor of the will, and by the decree in payment of the said sum, there being no money on hand, the court ordered distributed to said George E. Williams a certain piece of property.

The complainant does not charge that Thomas H. Williams or Frank Hansford Johnson consented to this allowance made by the court to George E. Williams for the purpose of defrauding him, and there are no allegations in the bill which serve in any wise to indicate to this court that any fraud was perpetrated upon the court in causing this particular piece of property described in the decree to be distributed to the executor as compensation for his services or in making the allowance to the executor.

Georgie E. Williams and Jennie R. Williams are in nowise concerned with the validity or invalidity of item 4 of the will, and it is not now and never was of any moment to them whether the same was or was not in restraint of alienation.

Question 5. Is the complainant barred by the statute of limitations, or are his remedial rights lost by reason of his laches?

A.

COMPLAINANT IS BARRED BY THE STATUTE OF LIMITATION.

There is no express trust charged in the bill, no allegation of words or acts indicating creation, acceptance, purpose, or beneficiary of a trust.

Civil Code, Sections 2221, 2222.

The averments of the bill are intended to raise a trust in equity, contrary to the intention of the defendants, upon the theory that the legal title to the properties of the estate of General Williams has been obtained by the defendants in

violation of, and is being held by them in hostility to, the rights of the complainant (2 Pom. Eq. Jur., par. 1044). This is an attempt to charge an involuntary or implied or constructive trust upon the theory that the defendants obtained the estate by fraud or mistake, under section 2224 Civil Code. It follows that the statute of limitation applies, which in this case is three years.

Sec. 338, Sub 4, Code Civ. Pro.

In Wood *v.* Carpenter, Justice Swayne, speaking of the statute of limitation, 101 U. S., 139, says:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together."

Simpson *v.* Dalziel, 135 Cal., 599, 601.
Norris *v.* Haggin, 28 Fed., 280.
Shain *v.* Sresovich, 104 Cal., 406.
Godden *v.* Kimmel, 99 U. S., 201.
Kirby *v.* Railroad Co., 120 U. S., 130.
St. Paul, Stillwater & Taylor's Falls Co. *v.* Sage, 49 Fed., 315, 318, 319.
Morgan *v.* Morgan, 10 Wash., 104; 38 Pac., 1056, 1058.
Jackson *v.* Jackson, 47 N. E., 964.
Murray *v.* Chicago & N. W. Ry. Co., 92 Fed., 872.
Boynton *v.* Haggart, 120 Fed., 819, 830.
Nichols *v.* Randall, 136 Cal., 426, 432.
Lewis *v.* Duncan, 71 Pac., 577, 578.
Townsend *v.* Eichelberger, 38 N. E., 208.
Rudland *v.* Mastic, 77 Fed., 688, 689.

It is apparent from the scope, the purpose and the affirmative allegation of the bill in this case that since January 5th, 1897, a period of more than seven years before this suit was commenced, the distributees under the decree of final distribution were in the open, visible, continuous, peaceable and exclusive possession, under the decree and with a claim of ownership, such as would notify parties seeking information upon the subject that the premises were not held in subordination to any title or claim of complainant or any other person, but adversely to all titles and to all claimants.

> "It is now well settled that, by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant."
>
> Sharon *v.* Tucker, 144 U. S., 533; 12 Sup. Ct., 720, 722.

> "A party must be presumed to know what by the exercise of reasonable diligence he might have discovered; and when the fundamental facts upon which the alleged fraud rests are matters of public record, open to inspection, he will not be permitted to plead ignorance of the fraud in order to avoid the operation of the statute."
>
> Black *v.* Black, 68 Pac., 662, 667.
> 19 Am. & Eng. Ency. Law, 251.
> Norris *v.* Haggin, 136 U. S., 386.
> Laird *v.* Kilbourne, 70 Iowa, 83; 30 N. W., 9.
> Bishop *v.* Knowles, 5 N. W., 139.
> Francis *v.* Wallace, 42 N. W., 323.
> Lewis *v.* Duncan, 71 Pac., 577.
> Hecht *v.* Slaney, 72 Cal., 363.
> Smith *v.* Talbot, 18 Tex., 774.
> Manning *v.* Tin Co., 9 Fed., 726.

To ascertain in cases of this character where the trust alleged is implied or constructive, when the statute begins to run, it is only necessary to recall the rule that "means of knowledge are equivalent to knowledge." When a person

has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it.

In Swift *v.* Swift, 79 Fed., 712, 713, the court says:

> "All of the facts on which she now relies for relief were spread upon the records of the probate court of Pueblo County, and upon the records of the Register of Deeds at Denver, in 1871, open and ready for her inspection. The natural place to inquire after property of the estate of Russell, when she knew that he had lived and died in Pueblo County, in the State of Colorado, was in the probate court of that county."

As every fact upon which complainant relies rests upon the probate proceedings antedating the decree of final distribution, and upon that decree; and as the natural place to inquire after the property of the estate of General Williams was in the Superior Court of the city and county of San Francisco, where complainant knew that General Williams had lived and died, it follows that the statute began to run when the decree of final distribution was rendered.

Boren *v.* Boren, 85 S. W., 46.

Furthermore, as the bill shows, the distributees have been in adverse possession since January 5, 1897, and the statute may be reckoned to have commenced running when they entered into possession under the decree, claiming ownership.

In Mason *v.* Odum, 71 N. E., 386, the administratrix sold lands to pay debts and bought them herself. This, of course, was improper, and the sale might have been set aside at the instance of any heir, but no objection was in fact made and the court held that the open possession of the administratrix and the record of conveyance were sufficient notice to put the heirs upon inquiry; that they must be presumed to have known all they could have learned by investigation, and that the claim was barred by limitation as well as by laches.

Hecht *v.* Slaney, 72 Cal., 366, 367.

In the case of Burling *v.* Newlands, 39 Pac., 49, the syllabus reads:

> "A cause of action for fraud is not taken out of the operation of the Statute of Limitations by Code of Civ. Pro., sec. 338., sub. 4, which provides that the statute does not begin to run until discovery of the fraud, where it appears that the slightest examination of the public records would have put the plaintiff in possession of the facts, and that they acquired their information on which the action was based by inquiry of their friends and acquaintances,—a course open to them before the statute had run.
>
> "Equity will not entertain a cause of action seeking relief from an alleged fraud, where complainants could have informed themselves of the facts by the exercise of reasonable diligence but delayed bringing suit for over ten years and until after the death of all the participants in the transactions."

The case also appears in 112 Cal., 476, where the same opinion is found as the concurring opinion in the case on p. 500, *et seq*. It is unanswerable, apt, and conclusive of this case.

> "Equity abhors a stale claim."
> Truett *v.* Onderdonk, 120 Cal., 581, 589.

The statutory period ran three times over before the bill was filed, if taken to commence when complainant was in San Francisco and when the executor informed him that his wife had no interest in the estate of General Williams, unless the time of its commencing to run was suspended for want of knowledge of the fraud alleged. But as the means of knowledge are the same thing as knowledge—are to be taken as knowledge, then complainant must be held charged with knowledge in November, 1893, for then the opportunity of discovering the precise terms of the will, the validity of its provisions, the heirs of the deceased, at law and testamentary, and the character, quantity, and condition of the estate,—was immediately at hand. It does not appear even that the

complainant demanded an inspection of the will, of the executor's books, or papers, or made an inquiry of any of the relatives, heirs, friends or acquaintances of the deceased. No "discovery was made, and it does not appear that any reason-"able efforts were made for a discovery of the alleged facts "upon which this action rests, until ten years after" the death of his intestate. The bill shows that the information upon which complainant bases his alleged facts, was obtained by an examination of the records of the Superior Court of Marin County and that of San Francisco. But such means were always within the reach of complainant, and, therefore, having the means of knowledge, he must be held, in equity, to have had the knowledge. He did not bring his action within the period required by the statute, and is accordingly barred.

Burling *v.* Newlands, 112 Cal., 476, 501-2.

As a party who seeks to avoid the plea of the statute is bound by stringent rules of pleading and is deemed to have stated his case in the strongest manner possible, and as all intendments are to be resolved against him (St. Paul, Stillwater & Taylor's Falls Ry. Co. *v.* Sage, 49 Fed., 315), it is submitted that complainant's claim is barred by limitation.

However, assuming that all of the elements essential to constitute adverse possession are not shown, and may not be deduced from the allegations of the bill, the decree of the circuit court must nevertheless be affirmed, because

B.

IT APPEARS UPON THE FACE OF THE BILL ITSELF THAT THE COMPLAINANT HAS BEEN GUILTY OF GROSS LACHES.

The complainant has been guilty of gross laches in commencing this action. The relief sought is to declare a trust and is obtainable only by virtue of the exclusive equity juris-

diction of the court, and the court, therefore, is justified in exercising its inherent power to refuse the relief sought because of the laches of the complainant. This power can be exercised independently of any statute of limitation, and independently of any pleading setting up laches as a defense—upon the face of the bill itself.

The executor was required by law to give notice to creditors; to render an exhibit or account within six months after letters were issued to him; to render an account within thirty days after the expiration of the period mentioned in the notice to creditors. As the estate was a large one and was under administration for about 11 years, it may fairly be presumed that many accounts and reports were rendered, and that the heirs annually petitioned for and had distributed to them the proceeds of the several shares of the estate to which they were entitled. The probate of the will, the matter of each account, and of each such other steps as was taken, was a proceeding *in rem*, to which all persons interested were noticed and made parties and in each of which proceedings the decree rendered therein was conclusive evidence of notice and finality. It must be assumed that complainant's wife knew the condition of the estate.

Robertson *v.* Burrell, 110 Cal., 577.
Hecht *v.* Slaney, 72 Cal., 363.

The fact is that she was the wife of Frank S. Johnson, one of the defendants and a resident of San Francisco until they were divorced in December, 1888, nearly three years after the death of her father, and after his will had been probated and letters thereupon issued to her uncle, Judge George E. Williams. She was the legatee and devisee of all of her father's household furniture and pictures (Trans., fol. 38, item 3 of will), a life tenant of $200,000.00 in property or money and of one-third of the remainder of the estate (Trans., fol. 39, item 4 of will), appraised at $1,465,800.00, and entitled to $250.00 per month pending distribution

(Trans., fol. 43, item 7 of will), plus such amount in addition as her circumstances might require (Trans. fol. 48, codicil). She was one of the defendants, personally appearing in the case of Williams *v.* Williams *et al.*, 73 Cal., 99, wherein the judicial construction of item 4, among other parts of the will, was the particular thing sought. She was the wife of the complainant from December 7, 1889, until her death on October 3, 1893. As such a beneficiary of such an estate, living about three years under the shadow of the court which controlled the administration of the estate, and almost four years in New York, participating in litigation relating to the construction of a part of the very clause of the will which is now attacked,—nearly seven years entitled to, and the presumptive and probable recipient of a handsome income derived from the estate, and heir to the use of and income from a large fortune provided by her testator, with every inducement, opportunity and facility at hand to ascertain,—it is incredible that she did not know the precise provisions of the will as well as the properties and condition of the estate. Under such circumstances the presumption that she knew ripens into a practical certainty.

Such acts, facts and circumstances are of the most conclusive character, and must be held to preclude and estop the complainant, who cannot be placed in any better position than his deceased intestate.

O'Dell *v.* Rogers, 44 Wis., 136, 181.

Mary B. Goodrich died on October 3, 1893, and immediately thereafter the complainant was in San Francisco, and in personal conference with George E. Williams concerning the interest of his deceased wife in the estate of her father, the testator. It must be presumed that he knew all antecedent matters relating to the estate of which his wife was informed as there is no allegation in the bill that any effort was ever made to conceal anything from or in any manner to defraud *her*.

Complainant, then, knew of the will; its probate; that the testator had died possessed of a large estate; that his wife, one of the children of the testator, was a beneficiary and heir-at-law. He was in San Francisco, where administration was pending, where will, inventory, appraisement, accounts, reports, and all papers and documents relating to the estate, were filed—were matters of public record, readily accessible,—where the living heirs-at-law and beneficiaries under the will and the defendants in this suit (Thomas H. Williams, Jr., Frank Hansford Johnson, Frank S. Johnson, Jennie E. Williams, George E. Williams), resided; where any and every inquiry, investigation and examination could be made, and reliable, authentic, record information of every proceeding had, and where all knowledge obtainable was at hand. He was an heir-at-law of his deceased wife, with important interests at stake, of mature years, and, presumably, in the full possession of the normal faculties of man. He examined no records, retained no attorney, employed no agent, inquired of no heir or party in interest—did nothing, save to rely upon the mere opinion—upon a question of law—of the executor, that Mary B. Goodrich, his wife, had no interest in the testator's estate, and that she had left no property or estate whatever. In short, the complainant took no steps to ascertain whether he had any interest or what interest he had in the testator's estate until his attention was called to the matter by a stranger in November, 1903, more than seventeen years after the testator's death; more than ten years after the death of his wife, and nearly seven years after the final distribution of General Williams' estate.

We quote from the bill (Trans., 14-15):

> "And your orator further shows unto your Honors that he has not been in the State of California at any time since the death of his wife, as aforesaid, except for a few days immediately after her death, when he brought her remains to San Francisco for interment. While in San Francisco the said George

E. Williams declared to your orator that his said wife had no interest in the estate of her deceased father, or property of any kind or character whatever, and that she left no estate; and your orator thereupon returned to his residence in the State of New York. That at the time of the death of your orator's said wife she was indebted to a firm of jewelers in the City of New York to the amount of several thousand dollars, and the creditor demanded payment of said indebtedness from your orator. That when in San Francisco your orator informed said George E. Williams of these facts and inquired of him whether the said wife of your orator had left any property or estate available for the payment of said demand, and the said George E. Williams assured your orator, and represented, stated and declared to him, that she had left no property or estate whatever, and your orator believed and relied upon the representations, declarations and statements of said George E. Williams, as aforesaid, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife; and being so induced, he did thereafter abstain from any such inquiry, and he knew nothing at all of the fact that he was entitled to any property as heir-at-law of his deceased wife, or under said will of Thomas H. Williams, deceased, until the month of November, 1903, when, in the City of New York, his attention was first called to said matter by a stranger, who, while in California pursuing an investigation not at your orator's instance, and not concerning him or his interest, had himself discovered the fact that your orator was entitled as aforesaid, whereupon your orator took steps at once to ascertain the facts connected with his interest in said property as hereinbefore stated, and retained counsel to prosecute the necessary inquiries relating thereto, and also to enforce such rights as your orator may have in the premises."

By his amendment to the bill (Trans., 69) the complainant alleges:

"That said George E. Williams was by profession an attorney at law of many years' practice and of

great experience, and for a number of years he was a judge of the Superior Court of the State of California. Complainant is not a lawyer, never was, and knew nothing of the laws of California. *Complainant knew nothing about the will of Thomas H. Williams, deceased, was not familiar with its terms and was not aware of the nature or extent of the provisions it made for his wife. All he knew was that his wife during their married life was receiving money from her father's estate in California.*"

By other allegations in the bill it is alleged:

That George E. Williams, Thomas H. Williams, Jr., and Frank H. Johnson, through his guardian, Frank S. Johnson, knew that the trust declared by the will was void at its creation; that there were questions of law and fact, which, in good conscience, should be submitted to and determined by the Superior Court of Marin County, wherein the matter of the estate and guardianship of Frank Hansford Johnson was pending, and by the Superior Court of the City and County of San Francisco, wherein the matter of the estate of Thomas H. Williams, deceased, was pending, and they knew that the complainant was the surviving husband of Mary B. Goodrich, one of the children and heirs-at-law of the deceased, and as such he was entitled to a share of her estate. With this knowledge they agreed that such questions of law and fact, and complainant's marriage with Mary B. Johnson, and his interest in and right to a portion of the estate of said deceased should be concealed and kept from said courts, and that they should so petition and they should so represent to said courts that the whole of the estate of said deceased should be appraised as required by subdivision 4 of the will—the alleged void trust clause—and distributed to Thomas H. Williams, Jr., Frank Hansford Johnson, and to George E. Williams as testamentary trustee.

Accordingly, on August 1st, 1896, Frank Hansford Johnson, through his guardian, petitioned the Marin County Court for leave to consent to a decree of final distribution of

the estate of said deceased, and for appointment of appraisers to appraise the same. In this petition the complainant's marriage and existence were concealed, and it was represented to the court that the minor, and Thomas H. Williams, and said testamentary trustee were the only persons interested in the estate. On the same day the Marin County Court made its decree permitting the minor to give such consent.

On August 7th, 1890, Thomas H. Williams petitioned the probate court of San Francisco to appoint appraisers, and failed to mention complainant's name or existence, but did represent that he and said minor and said testamentary trustee were the only living persons interested in the distribution of the estate. The court directed notice to be given to them, and to them only; they were the only persons served with notice. An order appointing appraisers was thereupon made and the estate was appraised at the sum of one million four hundred and sixty-five thousand eight hundred dollars and eight cents.

On December 15th, 1896, Thomas H. Williams, Jr., petitioned for final distribution of the estate. On the same day George E. Williams filed his final account and report, as executor, with a petition for settlement of the account and final distribution. In his petition complainant's marriage and interest in the estate were concealed and the petitioners informed the court that they and said minor were the only persons interested in the estate. The court decreed final distribution.

When the petitions for final distribution were filed, on December 15, 1896, the court made an order appointing December 26th, 1896, as the time for the settlement of the account and hearing of the report and petition of the executor, and of the petition of Thomas H. Williams.

The clerk of the court posted notices fixing the time for hearing on December 26th, 1896, at 2 o'clock p. m.

The notices given were of the character provided in, for the length of time required by, and in all respects complied

with the statute. The testator had been dead nearly four years when the complainant married his daughter. They were husband and wife nearly four years, during the whole of which time the complainant knew that his wife was receiving benefits from her father's estate. He knew there was a will, although he alleges that he was not "familiar with its terms and was not aware of the nature or extent of the provisions it made for his wife." The estate was appraised at about $1,500,000. The will, by item 7, allows the wife of complainant $250 per month, and the codicil authorizes the executor—an uncle—to increase that amount. The value of the estate justifies the inference that the monthly allowance was at least $250, and it may fairly be assumed, from the allegations of the bill, that the complainant knew his wife was receiving a handsome income, and that ever since her father's death and to the day of her own demise she had uninterruptedly accepted the benefits provided by the terms of her father's will.

This discloses inattention, indifference, and constitutes *laches*, supine, gross, inexcusable; such laches as precludes a court of equity from granting relief, independently of any other question in the case.

Real Del Monte M. Co. *v.* Pond M. Co., 23 Cal., 83, 85.
Harris *v.* Hillegass, 66 Cal., 79, 80.
West *v.* Russell, 74 Cal., 544, 547.
Chapman *v.* Bank, 97 Cal., 155, 159.
Shain *v.* Sresovich, 104 Cal., 405.
Langdon *v.* Blackburn, 109 Cal., 19, 28.
Robertson *v.* Burrell, 110 Cal., 468.
Burling *v.* Newlands, 112 Cal., 476, 500-3.
Lady Washington Co. *v.* Wood, 113 Cal., 581.
Plass *v.* Plass, 122 Cal., 3, 14, 15.
Manning *v.* San Jacinto Ins. Co., 9 Fed., 737.
Pratt *v.* Cal. Ming. Co., 24 Fed., 869, 875-6.
Kittle *v.* Hall, 24 Blatchf., 188; 29 Fed., 511.
Teall *v.* Slaven, 40 Fed., 774, 777-781.

Jessup *v.* Ill. Cent. R. Co., 43 Fed., 483, 503.
Naddo *v.* Bardon, 47 Fed., 489, 490-1.
Halsley *v.* Cheney, 68 Fed., 763, 767.
Dugan *v.* O'Donnell, 68 Fed., 986, 992-3.
Hoover *v.* Perry, 112 Fed., 906.
Darnold *v.* Simpson, 114 Fed., 368.
Kimbell *v.* Chicago Brick Co., 119 Fed., 102.
Kessler *v.* Ensley Co., 123 Fed., 547, 561-2.
Richards *v.* Mackall, 124 U. S., 183; 8 Sup. Ct., 437, 440.
Bell *v.* Hudson, 73 Cal., 285.
Piatt *v.* Vattier, 9 Pet., 416.
McKnight *v.* Taylor, 1 How., 168.
Badger *v.* Badger, 2 Wall., 94.
Harwood *v.* Railroad Co., 17 Wall., 78, 81.
Hume *v.* Beall, 17 Wall., 336.
McQuiddy *v.* Ware, 20 Wall., 19.
Marsh *v.* Whitmore, 21 Wall., 184, 185.
Sullivan *v.* Railroad Co., 94 U. S., 811.
Hayward *v.* Bank, 96 U. S., 617.
Godden *v.* Kimmell, 99 U. S., 211.
Wood *v.* Carpenter, 101 U. S., 139.
Wollensak *v.* Reiher, 115 U. S., 92, 99; 5 Sup. Ct., 1137.
Speidel *v.* Henrici, 120 U. S., 377, 387.
Edwards *v.* Mercantile Trust Co., 124 Fed., 381.
Galliher *v.* Caldwell, 145 U. S., 368, 371-3.
Johnson *v.* The Standard Ming. Co., 114 U. S., 370.
Abraham *v.* Ordway, 158 U. S., 416; 15 Sup. Ct., 894, 896.
Willard *v.* Wood, 164 U. S., 502, 524.
Lardrum *v.* Union Bank, 63 Mo., 53.
Kelley *v.* Hurt, 74 Mo., 561, 564.
Kline *v.* Vogel, 90 Mo., 239, 247-9.
Sheldon *v.* Rockwell, 9 Wis., 166, 181.

Neppach *v.* Jones, 20 Or., 491, 493-4; 23 Am. St. Rep., 145, 147.
12 Ency. Pl. & Pr., 829-830.
Wetzol *v.* Transfer Co., 65 Fed., 23.
Felix *v.* Patrick, 145 U. S., 317.
Kinne *v.* Webb, 54 Fed., 34.
Hammond *v.* Hopkins, 143 U. S., 250.

As with limitation, so with laches, which, in the absence of express rule, is applied by courts of equity upon somewhat analogous principles, though the question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all of the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did (Townsend *v.* Vanderwerker, 160 U. S., 171; 16 Sup. Ct., 258, 262). Stated otherwise, each case must be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat an action in one case, a larger period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, the want of probable grounds for the imputation of intentional fraud, the loss of specific testimony, the absence of any reasonable impediment to the assertion of the alleged rights, and the like (Hammond *v.* Hopkins, 143 U. S., 224; 12 Sup. Ct., 418). As said in the case of Johnson *v.* Florida Transit and Peninsula R. Co., 18 Fed., 821:

> "The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded on a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society."

The observations of the judge just quoted are particularly pertinent here in view of complainant's claim that in an interview with the executor he was informed that his wife had no estate, and that he relied upon such information. Whether the complainant's version of the interview is the correct one must depend upon what was actually said at that time, and as to this the death of Judge Williams places the defendants at a great disadvantage. Were the executor living we might satisfy the court that no such interview occurred, or, if it did, that no such statements were made. The rule that equity will discourage stale demands is

> "peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible."
>
> Burling *v.* Newlands, 112 Cal., 476, 502-3.
> Hammond *v.* Hopkins, 143 U. S., 250.
> Bell *v.* Hudson, 73 Cal., 285, 288-9.
> Barnes *v.* Taylor, 27 N. J. Eq., 259, 261-2.
> German American Seminary *v.* Kiefer, 43 Mich., 105, 111.
> Mooers *v.* White, 6 Johns. Ch., 360, 372-3.
> Teall *v.* Slaven, 40 Fed., 777, 781-2.
> Dugan *v.* O'Donnell, 68 Fed., 990, 992-3.
> Hoff *v.* Jenney, 54 Mich., 510; 20 N. W., 563.
> Lant *v.* Manley, 71 Fed., 19.

George E. Williams, the executor, died on December 17, 1899.

The means of knowledge are the legal equivalents of knowledge itself. Complainant was in San Francisco in October, 1893. He knew that General Williams had lived and died in this city; that he left an estate and a will; that his wife had been in receipt of an income from the estate, and that Judge Williams was the executor of the will; that

the estate was in process of administration, and that the records of the probate court were immediately at hand to supply any desired information relating to the character, value and condition of the estate, the terms of the will, its beneficiaries, and all of the proceedings thus far had in the management of the property. The law furnished him complete knowledge of every step that might thereafter be taken. There was no trick or contrivance or misleading device practiced to exclude suspicion or prevent inquiry. He had seasonable knowledge and opportunity to determine and protect his interest in the estate, if he had any. With the strongest reasons for activity, he was supine. With the strongest motives for diligence and perseverance in the ascertainment and pursuit of the claims he now asserts, he has been grossly negligent.

In Hecht *v.* Slaney, 72 Cal., 367, the court says:

> "*Vigilantibus, non dormientibus, jura subveniunt,* has peculiar application. The rule in such cases is, that a party is presumed to know whatever he might, with reasonable diligence, have discovered; and when the fundamental facts upon which the alleged fraud rests are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches, nor stay the running of the statute."
>
> Smith *v.* Talbot, 18 Tex., 775.
> Nudd *v.* Hamlin, 8 Allen, 130.
> Manning *v.* San Jacinto Tin Co., 7 Sawy., 418.
> Royce *v.* Hampton, 16 Nev., 33, 34.

A full and interesting case on this question of laches is Williamson *v.* Beardsley, 137 Fed., 467. The action was by non-residents to set aside orders of sale of the District Court of Salt Lake County, Utah, probate division, and executor's deeds made pursuant thereto, upon the ground that the acts of the executor were fraudulent as to the complainants; that they did not discover such fraud until shortly before the suits were instituted, &c.

The court said, page 469:

> "To escape the bar of the statute, or rather to evade the application of the equitable doctrine of laches, the appellants averred in their bills of complaint that the executor acted fraudulently, and also that they had no notice or knowledge of the orders of the State court or of the fraudulent acts of the executor resulting in the sale and conveyance of the property until within a few months of the institution of their suits. They now contend that those averments made their bills of complaint secure from the attack of the demurrers. There was, however, an entire absence of averment of substantive facts justifying the charge of fraud; and in such a case the mere use, by the pleader, of the terms 'fraudulent' and 'fraudulently' signifies nothing. * * * Viewing the bills of complaint in the aspect most favorable to the appellants, it does not appear that the executor acted otherwise than in the utmost good faith."

And on page 470:

> "The appellants also contend that the statute of limitations had not run, and that they are not subject to the charge of laches because they did not until recently discover the existence of the proceedings of the State court and the alleged defects therein upon which they rely to defeat the orders of sale and the deeds. It appears from the averments of the bills of complaint that they knew of the will of the testator, its provisions, and the granting of letters testamentary in 1883. They therefore knew that administration upon the estate had begun and was in court. They were charged with knowledge that their title to the property devised to them might in certain contingencies be divested under the authority of a statute of Utah. * * *
>
> "The proceeding of administration was in the nature of a proceeding *in rem*, and in a sense the appellants were parties thereto. Everything they now complain of appeared upon the public records. There was no fraud, no deception, no concealment, nor were the matters of which complaint is made of such a

character that they would ordinarily remain secret. Under these circumstances it is a misapplication of terms to say that the grounds of action were discovered years after they arose and appeared upon the records of the court. Discovery as employed in a statute or equitable rule of limitations and knowledge are not convertible terms, nor does the former mean the result of a resort at leisure to known sources of information. The possession of the means of knowledge is equivalent to knowledge itself. A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches. The grounds of attack against the validity of the orders of sale and the executor's deeds were matters of record. They had notice of the pendency of the administration proceedings sufficient to excite their attention and to put them on guard as to the course thereof. Under these circumstances they must be deemed to have had actual knowledge of what the record showed."

And on page 471:

"The appellants claim they were ignorant of the matters complained of until November 1, 1901. This was nearly eighteen years after the admission of the will to probate and the issue of letters testamentary; nearly six and one-half years after the entry of the orders for family allowance upon which, in part, the subsequent orders of sale were based; more than four and one-half years after the order of sale in one case, and more than five years in the other. In each case the sale was made and the deed was executed shortly after the entry of the order. It does not appear that during these years the appellants took any steps or made any inquiry for the ascertainment of the patent facts or the protection of their interests. *The sole excuse presented in the bills of complaint is that they were non-residents of and absent from Utah, and such excuse is insufficient either in law or equity. Whether time runs against the assertion of their claim cannot be made to depend upon their proximity to or remoteness from the seat of the court whose orders are*

> *in question. There is no such quality in distance from the location of public records as would enable us to say that those living within the State are bound to diligence while those living in neighboring States may rest secure without care or inquiry."*

By section 19 of the Civil Code of California, it is provided:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Speaking of laches the Supreme Court of the United States said:

> "The defense of want of knowledge of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of the facts."
>
> Foster *v.* Mansfield R. R. Co., 146 U. S., 88-99; 36 L. Ed., 903.

In the case of Lady Washington Co. *v.* Wood, 113 Cal., 482, it is held that "discovery" and "knowledge" are not convertible terms, and whether there has been a "discovery" of the facts constituting the fraud alleged within the meaning of the statute of limitations *is a question of law to be determined by the court from the facts pleaded.* The court says:

> "As in the case of any other legal conclusion, it is not sufficient to make a mere averment of lack of discovery or knowledge, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not since been informed of them

> until within three years, but *he must also show that the acts of fraud were committed under such circumstances that he could not be presumed to have knowledge of them,* as they were done in secret or kept concealed; and he must also show the times and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of the facts was within the time alleged; *and as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of those facts.*"
>
> Hardt *v.* Heidweyer, 152 U. S., 547; 38 L. Ed., 552.

The rule is thus stated in Smith *v.* Martin, 135 Cal., 254:

> "In actions based on fraud either at law or in equity, for the purposes of the statute of limitations, if the means of knowledge exist and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what would have been readily ascertained by such inquiry."

And in Bell *v.* Soloman, 142 Cal., 69:

> "If the party obtains knowledge or information of facts which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly lead to the discovery of a conflicting claim, *then the inference that he acquired the information constituting actual notice is necessary and absolute.*"

In Champion *v.* Woods, 79 Cal., 17, 20, the Supreme Court of California said:

> "It is not sufficient under any circumstances that the party complaining was ignorant of the truth of

> the matter concerning which the representations were made, and that he believed them to be true. The situation may be such that he will be deemed in law to have knowledge of the facts, and barred from making complaint, though actually ignorant of the true state of facts. It is a general principle that if the means of knowledge be at hand, and equally available to both parties, and the subject matter be open to inspection of both alike, and there be no fiduciary or confidential relation and no warrant of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party, * * * and if the circumstances attending the transaction are such as to put a reasonable person upon inquiry, there can be no presumption of deceit."

In Denton *v.* Baker, 93 Fed., 46, the Circuit Court of Appeals, by Ross, circuit judge, states the law upon the subject as follows:

> "The power of a court of equity to relieve against a judgment, upon the ground of fraud, in a proceeding had directly for that purpose, is well settled; and the power extends also to cases of accident and mistake. *But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law.* In all such cases, he must be without fault or negligence. *If he be not within this category the power invoked will refuse to interfere, and will leave the parties where it finds them.*
>
> "Laches, as well as positive fault, is a bar to such relief. * * * The receiver, therefore, had ample opportunity to take appropriate proceedings in the very action in which the judgment was rendered, to contest its validity on any ground of fraud or irregularity that existed. Instead of resorting to that forum * * * he brought the present suit in the court below. That a court of equity will not interfere, under such circumstances, is thoroughly well

settled, as will be seen by a reference to the authorities already cited."

In the case of Swift *v.* Smith, decided by the Court of Appeals of the Eighth Circuit, the following excerpt is in point:

> "Counsel for the appellant invoke the principle that there can be no acquiescence where there is no knowledge, and contend that, since the appellant did not know that she had any interest in these lots until 1891, she cannot be charged with laches in asserting her rights. But ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it."
>
> 79 Fed., 712, 713.

In Howard *v.* Nat. Bank, 96 U. S., 611, the court, on page 617, says:

> "In Smith *v.* Clay (Amb., 645), Lord Camden said:
>
> " 'A court of equity, which is never active in granting relief against conscience or public convenience, has always refused its aid to stale demands, when a party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced.' These doctrines have received the approval of this court in numerous cases. Twin Lick Oil Co. *v.* Marbury, 91 U. S., 587; Badger

v. Badger, 2 Wall., 87; Marsh *v.* Whitmore, 21 Wall., 187; Harwood *v.* Railroad Co., 17 Wall., 79."

Sullivan *v.* Portland, etc., R. R. Co., 94 U. S., 806, 811, 812.
Richards *v.* Mackall, 124 U. S., 183, 188.
Piatt *v.* Vattier, 9 Pet., 403, 416.
Speidel *v.* Henrici, 120 U. S., 377, 387.

In Kline *v.* Vogel, 90 Mo., 239, 247-9, the court said (p. 248):

"But when the relief sought is based upon a right purely equitable, where it is cognizable alone in a court of conscience, then that court acts solely upon its own inherent rules, altogether outside of and independent of the statute of limitations. As was said in Landrum *v.* Union Bank, 63 Mo. 56: * * * '*Laches* is an equitable defense, and there is no artificial, fixed or determinate rule on this subject, but each case, as it arises, must be decided according to its own particular circumstances.' In Badger *v.* Badger, 2 Wall., 94, when speaking of the subject of laches, the court says: 'Courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere when there has been gross laches in prosecuting the claim, or long acquiescence in the operation of adverse rights.' In Sullivan *v.* Railroad, 94 U. S., 807, Mr. Justice Swayne says: * * * 'If the case, as it appears at the hearing, is liable to the objection by reason of the *laches* of the complainant, the court will, upon that ground, be passive and refuse relief. * * * Sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required, in some cases a shorter time is sufficient, and sometimes the rule is applied when there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and decide accordingly.'"

In Galliher *v.* Caldwell, 145 U. S., 368, the court said (p. 373):

> "*Laches* is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an equity founded upon some change in the condition or relations of the property or parties."
>
> Mackall *v.* Casilear, 137 U. S., 556, 566.
> Lane & B. Co. *v.* Locke, 150 U. S., 193.
> Martin *v.* Gray, 142 U. S., 236.
> 12 Rose's Notes to U. S. Rep., 218.

In Pratt *v.* California Min. Co., 24 Fed., 869, the complainant filed a bill to obtain a decree declaring him to be the owner of an interest in certain mining property. The case was heard before the late Judges Sawyer and Sabin, the latter delivering the opinion of the court, in which he said (pp. 875-876):

> "Another matter of defense is urged upon our attention, to wit: the staleness of plaintiff's claim. And we consider it, since if we are wholly wrong in our determination of the questions of fact involved in this case, we still think that, in view of complainant's laches, neglect, acquiescence, and delay in the assertion of his alleged rights, he has no standing in a court of equity to demand the relief sought, or any relief. Upon this point complainant's counsel insist 'that the statute of limitations of Nevada must control the court in the determination of this question.' We do not view the subject in this light; but if counsel's position be true, it seems to us that it is absolutely fatal to complainant's standing. The statute of limitations has little, if anything, to do with this defense—that of complainant's *laches*—unless by way of analogy. This defense arises independently of the statute, and may arise either upon the bill of complaint as presented to the court, or upon the whole case as disclosed by the evidence.
> * * *
>
> "In the case before the court, the bar of the statute is not invoked by formal plea. Defendant being

> a foreign corporation, could not, under the rulings of the Supreme Court of Nevada, plead the statute in this action had it desired to do so. This, however, is of slight significance. As we have observed, this defense arises independently of the statute of limitations. The jurisdiction of equity courts was established by act of Parliament in 1349, though these courts had existed long prior thereto, with a somewhat uncertain jurisdiction."

Halsey *v.* Cheney, 68 Fed., 763, was a suit against a trustee for an accounting; the bill was dismissed for laches, and the court, referring to the case of Abraham *v.* Ordway, 158 U. S., 416 (15 Sup. Ct. Rep., 894, 896), for a pertinent discussion of the effect of *laches* upon the right to relief in equity, on page 768 quotes therefrom the following:

> "It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. * * * But it is now well settled that independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will in such cases decline to extricate the plaintiff from the position in which he has inexcusably placed himself and leave him to such remedies as he may have in a court of law. Wagner *v.* Baird, 7 How., 234, 238; * * * Brown *v.* Buena Vista Co., 95 U. S., 157, 159." * * *

Kessler *v.* Ensley Co. (Ala.), 123 Fed., 546, was a suit by stockholders against the corporation defendant and its officers, charging the latter with breach of trust, conspiracy, concealment, and fraud through which they acquired title to their company's assets real. The statute of limitations for the recovery of land in Alabama is ten years. The

suit was commenced about ten years after the alleged fraud and within three months after the discovery thereof. The court held that the fraud should have been discovered by the exercise of reasonable prudence and diligence, and sustained the demurrers interposed to the bill.

The court said (p. 561 *et seq.*):

> "Complainants insist that their delay of over four years, under the circumstances disclosed by the bill, cannot bar them of relief, because this is a suit in equity for the recovery of land; that the limitations to such actions by the statute of this State is ten years. * * * That the statute, by its terms, applies to suits in chancery as well as actions at law; that complainants have brought their suit within the statutory period, and the Federal court sitting in this State is bound by the statute, or, if not bound, ought to follow the decision cited, construing the State statute, which gives complainants the full statutory period in which to sue, to *establish a constructive trust*, and regain possession of the lands from the purchaser *mala fide*. * * * There are two sufficient answers to this contention. The Supreme Court of this State has never construed these statutes *to abolish the doctrine of laches* where the owner of land, who has been defrauded into making a conveyance and seeks to recover possession, has failed to make his election to avoid the transaction in a reasonable time after he discovers, *or should have discovered*, the fraud; nor has it held that the owners of lands who know that another is in possession, improving the property, under a deed or contract of sale, made by the owner's apparent authority, may wait the whole statutory period to eject the purchaser, regardless of the plaintiff's *laches*. * * * A. G. S. R. Co. *v.* S. & N. R. R. Co., 84 Ala., 579; 3 South., 286; 5 Am. St. Rep., 401. So if this court were bound by the Alabama statute in the application of *laches* to a purely equitable remedy, the State decisions show that the complainants' contention cannot be maintained. If, however, the Supreme Court of this State had construed the statute otherwise, this court could not fol-

low it. This is not a case of concurrent jurisdiction. The relief sought is not within the power of a court of law. It can be had only in equity. The fundamental doctrines upon which courts of the United States administer equity must be the same in every State, and cannot be changed by statute. Kirby *v.* Lakeshore R. R. Co., 120 U. S., 138; 7 Sup. Ct. Rep., 430. It has often been held that 'the period of limitation in equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or preclude the court from denying relief, in accordance with equitable principles, for unreasonable delay, although the full period fixed by the statute has not elapsed since the cause of action accrued.' Calhoun *v.* Millard, 121 N. Y., 69; 24 N. E., 27; Beach's Mod. Eq. Jur., sec. 20; see Pomeroy's Eq. Jur., secs. 817, 818, 819, which are cited in approval in Hammer *v.* Moulton, 138 U. S., 491; 11 Sup. Ct. Rep., 408."

Chapman *v.* Bank of California, 97 Cal., 155, 159.

It is manifest that the slightest perusal of the will of General Williams, the accounts, petitions, returns, orders, and files of the estate generally, would quickly have led up to knowledge of what complainant charges as constructive fraud, and knowledge would have provoked inquiry, which, if followed up within any reasonable time, would have inevitably informed complainant of the grievances he now asserts. Every facility for investigation and action was on hand when complainant was in San Francisco in October, 1893. Every opportunity was then afforded—at hand, for application to the probate court for the share of the income of the estate to which he claims title, or for partial or final distribution of such share. To say that he then relied upon the mere opinion of the executor—his conclusion that under its terms and provisions his deceased wife had no interest in the estate; to make no inquiries as to the conditions of the

will or the character or value of the estate and why his wife's interest terminated in the estate, of the heirs and final distributees, or of any attorney or agent of his own; to sit supinely by and allow ten years to pass—until some stranger called his attention to the matter in November, 1903, is to write himself the most negligent of men and forfeit every right to apply to a court of equity for relief.

See—

Teall *v.* Slaven, 40 Fed., 779, 780.

In short, the court cannot entertain this bill unless it repudiates the equity maxim that "nothing can call this court into activity but conscience, good faith, and reasonable diligence." And herein the strictness of discovery required in cases of this character is only the application of principles which have always been acted upon in courts of equity.

> "There must be reasonable diligence, and means of knowledge is the same thing as knowledge itself. The delay which has occurred must be shown to be consistent with the requisite diligence."
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> Kessler *v.* Ensley Co., 123 Fed., 566.
>
> Wood *v.* Carpenter, 101 U. S., 140.
>
> New York City *v.* Pine, 185 U. S., 93; 22 Sup. Ct., 592.
>
> Hardt *v.* Heidweyer, 152 U. S., 547.

In Plass *v.* Plass, 122 Cal., 3, the court said:

> "It is undoubtedly true that courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his *laches* in asserting them. Where conscience, good faith, and reasonable diligence are wanting, the court is passive and does nothing, and its equitable powers will not be called forth into activity."

The rule is clearly and tersely stated in Douglass *v.* Douglass, 72 Mich., 86, on page 98 of the opinion:

> "Equity aids the vigilant; not those who slumber on their rights. This rule is designed to promote

diligence on the part of suitors; to discourage laches, by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of the statutory periods of limitation. 1 Pom. Eq. Jur., sec. 418."

In support of the rule that possession of the means of detecting fraud to excuse delay, is, in equity, the same as knowledge of the fraud, the case of

Loomis *v.* Rosenthal (Or.), 57 Pac., 55,

is directly in point. The court there says (p. 60):

"To entitle them to recover thereon, they must show that by the exercise of reasonable diligence they would have failed to discover the fraud of which they aver they were ignorant. In Johnston *v.* Mining Co., 148 U. S., 36; 13 Sup. Ct., 585, it is held that, where a question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, providing the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence. In Bacon *v.* Chase (Iowa), 50 N. W., 23, the facts were that a man, having died in Iowa, seized of certain lands in that State, left surviving him several minor children, who resided in Massachusetts. Their lands, without notice to them, were sold by order of the probate court of Woodbury County, Iowa, to pay the debts of the estate. Ten years after the youngest heir became of age, suit was instituted to recover such lands from the purchasers under the administrator's sale, and, it appearing at the trial that the heirs had known for many years that their ancestor died seized of these lands, but they had made no inquiries as to their rights until a short time prior to the commencement of the suit, it was held that they were guilty of such laches as to preclude their right of recovery. To the same effect, see Teall *v.* Slaven, 40 Fed., 774; Naddo *v.* Bardon, 51 Fed., 493; Hayward *v.* Bank, 96, U. S., 611; New Albany *v.* Burke, 11 Wall., 96; Hardt *v.* Heidweyer, 152 U. S., 547; 14 Sup. Ct., 671."

McKnight *v.* Taylor, 1 How., 161.
Tash *v.* Adams, 10 Cush., 252.
Carpenter *v.* Carpenter, 70 Ill., 463.

In Norris *v.* Haggin, 28 Fed., 265, the court, quoting from many adjudications upon the subject, held (p. 280):

> "The settled principles on this point are that the party defrauded must be diligent in making inquiry; that the means of knowledge are equivalent to knowledge; that a clue to the facts which, if followed up diligently, would lead to a discovery, is, in law, equivalent to a discovery,—equivalent to knowledge."

Quoting from Wood *v.* Carpenter, 101 U. S., 139:

> "Proper diligence could not have failed to find a clue in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort."
>
> "Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."
>
> "The presumption is that if a party affected by any fraudulent transaction or management, might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."
>
> "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same, in effect, as knowledge itself (Buckner *v.* Calcote, 28 Miss., 432, 434; Nudd *v.* Hamblin, 8 Allen, 130; New Albany *v.* Burke, 11 Wall., 107; Badger *v.* Badger, 2 Wall., 95)."

In Manning *v.* San Jacinto Tin Co., 9 Fed., 726, Judge Sawyer, after comment upon and approval of the doctrine of Case of Broderick's Will, *supra*, said, (p. 737):

> "It must not be forgotten not only that the world 'moves on,' but that in this age and country, and in this part of the country, it moves rapidly. Three

years now, and especially in California, is longer, in events and progress, than 20 years some centuries ago, when the statutes of limitations were adopted in England. Parties cannot lie down to sleep upon their rights, and on waking up many years afterwards find them in the same condition in which they were left. Even Rip Van Winkle, in a slower period and among slower people, when aroused from his 20 years' slumber in the recesses of the mountains in the neighborhood of 'Sleepy Hollow,' found that the world had 'moved on.' The observations of the Chief Justice in Vance *v.* Burbank, 101 U. S., 520, are not misappropriate to this case. Among other things, he says, with reference to the facts of that case, 'if any was in fact not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of suit, he must have been grossly neglectful of his own interests.'

"The same may be said of the complainant in this case. If the open, known, notorious facts suggested in the bill, and apparent upon the public records of the county, did not in fact put the complainant and his 'grantor' upon inquiry, and lead them to a discovery of the frauds charged, at least sufficiently to afford as good a basis upon which to file a bill of discovery containing general and sweeping charges 'upon information and belief' as that upon which the present bill rests, they must, indeed, 'have been grossly neglectful of their own interests.' "

Teall *v.* Slaven, 40 Fed., 774, 778-782.
Naddo *v.* Bardon, 47 Fed., 787, 788.

In Lant *v.* Manley, 71 Fed., 7, the court, on page 19, says:

"Where the matters complained of as frauds are evidenced by public records, accessible to all, it is settled by the judgments of the Federal and State courts alike that the party who seeks to avoid the effect of such notice must show something more than concealment by mere silence,—some affirmative act of deception; some misleading device or contrivance on

> the part of the party charged with fraud intended to exclude suspicion, prevent inquiry and the institution of adequate measures of redress."

The allegations in the bill relating to his interview with the executor are loose, vague, and exceedingly general, and, herein, are fatally defective.

The court, in Edwards *v.* Mercantile Co., 124 Fed., on page 391, says:

> "The complainant does not allege that he has made any inquiry whatever, or that he has been denied any information which he might have obtained by inquiry had proper answers been given,"

and held that, under such circumstances, to remain uninformed for a period of eight years, constituted such laches as required the demurrer to be sustained.

In Kimbell *v.* Chicago Brick Co., 119 Fed., 102, the court held (page 107) that where an attempt is made to charge one as a constructive trustee of money or property, the rule, requiring a private suitor to be diligent and to plead and establish some adequate reason for his silence and inaction during a period of years, is strictly enforced (Wetzel *v.* Transfer Co., 65 Fed., 23); and said:

> "The wrong or fraud complained of in the present instance should have been discovered, and would have been discovered by the complainants almost as soon as it was committed, if they had exercised even ordinary diligence;"

and on page 106 said:

> "Under these circumstances, it is well settled by repeated decisions that complainants are barred of their rights of relief. Courts of equity are not disposed to upset business transactions, or to disturb titles, that have passed unchallenged for years; and they will not do so unless at the instance of a suitor who has been diligent and persevering in the pursuit of his rights, and who can and does show good and

sufficient reasons for not making an earlier application for relief. This doctrine is elementary, and has been frequently reiterated and applied, especially by the federal courts."

Wetzel *v.* Minn. Ry. Transfer Co., 65 Fed., 23, 26, 27-9.

In Darnold *v.* Simpson, 114 Fed., 368, the court held that the mere concealment of fraudulent conduct, and that complainant knew nothing of the situation until a short time before commencing suit is insufficient, where diligence would have enabled the defrauded party to discover the facts, and said, page 370:

"They knew their relations to the parties to whom the trust was originally created * * * *The slightest examination of the records of the probate court* * * * would have put them on the track which would have led to the unearthing of the whole situation. The only allegation is that they did not know until recently. This is not sufficient. * * *.

"In the case at bar it was within complainants' knowledge of who their ancestors were, where the estates were situated, and what courts took jurisdiction over their estates, and the records of such courts were open to their inspection. Had they gone there, they would have ascertained all facts."

In Shain *v.* Sresovich, 104 Cal., 402, the court said:

"The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own negligence."

On page 406, the court said:

"Statutes of limitations are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened juris-

> prudence; they promote repose by giving security and stability to human affairs; important public policy lies at their foundation; they stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending the limit prescribed, is itself a conclusive bar."

As a reason why the court should not hear the defense of laches the complainant alleges and says that the lands distributed have not increased in value; that no improvements of great value have been made upon them, and that their rents and profits have exceeded the expenditures for their benefit.

These considerations only apply in exceptional cases, and this is not one of them.

The true rule in cases of this character is well stated in

> St. Paul, Stillwater & Taylor's Falls Ry. Co. *v.* Sage, 49 Fed., 315,

where the court says, on page 325:

> "It is urged in argument that it does not appear that the lapse of time has put the defendant company or any one else at a disadvantage, and therefore there is no ground for applying the doctrine of laches. *The lapse of time is almost certain to affect the evidence upon which the legal rights of the parties are dependent; and that is a sufficient reason for requiring diligence at the hands of a suitor in equity in all cases wherein it appears that delay may have put a party to a disadvantage in the procurement of material evidence.*"

On page 326 the court holds that there lies at the foundation of the principle that lapse of time will become a defense to the title of one in possession of property, not only consideration for his personal rights and equities, but also a recognition of the higher public rights and interests, which can only be subserved by putting at rest, as speedily as

possible, all doubts and uncertainties touching the title to realty, to which end it is the duty of courts to discourage delays in the assertion of conflicting claims thereto. Public confidence should not be weakened as to the sufficiency of the recognized and established evidences of title. It is of the highest importance and to the general public interest that stability in the title to property should exist, so that it may safely be improved to the best advantage, and rendered as productive as possible, and these results cannot be expected if the parties in possession are in doubt whether, if they sow, they will be permitted to reap the harvest.

The bill alleges that General Williams died intestate; that upon his death his estate vested in his heirs-at-law; that upon the death of complainant's wife he became entitled to seven thirty-seconds of the real estate then in the hands of the executor; that these defendants are trustees for all of the real estate which complainant became so entitled to, and that said real estate should stand so charged with such trust.

It is manifest that every claimant to the real estate may be charged as a trustee; that it may be claimed that every purchaser is to be charged with notice of fraud spread upon the face of the probate proceedings; that the instant the bill of complainant was filed it threw a cloud over the title to every acre; that the value of the property is depreciated; that the fact that the title is thus attacked and clouded must discourage all claimants and deter them from making valuable and permanent improvements—a loss to the claimants and community alike which can never be made good, for no human power can recall the period which elapses during litigation; if there is to be no limit to claims of this character, who will take and improve the estates of decedents?

What shall be done with the city properties of this estate destroyed by the earthquake and fire of 1906, and how may its reclaimed lands, submerged by the great floods of that year and of this, be reclaimed and restored to productive fertility?

Every consideration of public and private interest requires that repose be quickly assured to rights acquired under circumstances prevailing here, and hence this case belongs to a class which demands vigilance, diligence and prompt action on the part of him who proposes to question the rightfulness of the apportionment made through the decree of distribution.

These principles are elaborated on pages 326 and 328 of the case last quoted from.

In Wetzel *v.* Minnesota Railway Transfer Co., 65 Fed., 28, the court says:

> "It must be presumed that they were acquainted with the law. * * * They must also be presumed to know whatever could have been discovered, had they made such use of the knowledge which they are presumed to have possessed, as other persons of fair intelligence would have made of it. Stating the proposition in a different form, it may be said that they cannot plead ignorance of the rights now asserted, as an excuse for long years of delay, where it is evident that such ignorance was due to their own neglect in failing to take any steps * * * which they knew they were entitled to. * * * While it is true that ignorance of one's rights will serve as an excuse in a court of equity for not bringing a suit to enforce them, yet it will never have that effect where such ignorance is fairly attributable to negligence or to a party's failure to make such inquiries with respect to his rights as, with the information at his command, he ought to have made."

This case clearly shows that it is not a harsh rule which imposes upon complainant the duty of knowing the law. The old maxim, "ignorance of the law excuses no one," is certainly as applicable to the complainant as to Judge Williams. He is credited with knowledge of some law or decision which rendered the will void, which complainant professes ignorance of. The rule is not that lawyers are presumed to know the law, but that every one is presumed to

know it. Judge Williams doubtless honestly believed the will valid when he told complainant, in 1893, that his wife had no interest in the estate; but they complain that when the Walkerly case was subsequently decided it must be presumed that he learned of his mistake and should then have corrected it. Our answer is:

There is no allegation that Judge Williams ever read or heard of the Walkerly case; that even if he had read that case he may not have thought it applicable to the will of General Williams, or, if applicable, that it was correctly decided; that as to law so as to cases deciding the law, and so if it is to be presumed that Judge Williams knew the law and the Walkerly case, the same presumption equally applies to complainant; that there was no fact peculiarly within the knowledge of Judge Williams; he knew nothing; he had no means of knowing anything which the complainant did not have the opportunity and means of knowing himself; that he owed no special duty to complainant, and that there is but one safe course for an executor to follow, and that is to implicitly follow the directions contained in the will.

Wangans Appeal, 28 Pa. St., 471.
Estate of Willey, 140 Cal., 238, 241.

It is the duty of an executor to defend a will when it is contested.

Fenner *v.* McCann, 49 La. Ann., 600.
Camden *v.* Barnes, 4 Gill (Md.), 55; 45 Am. Decs., 115.
Marineer *v.* Bateman, 4 N. C., 464.
Ralston *v.* Telfare, 22 N. C., 414.
John *v.* Tait, 7 Humphrey (Tenn.), 388.
Bennett *v.* Bradford, 1 Caldwell, 471.
Bradford *v.* Boudinot, 3 Wash. (U. S.), 122.

Consider the result if the door of a court of equity is to be opened to a claimant in a case of this character. It is asserted that the petitions to the court of guardianship and to the probate court, and the decree of the latter court, show upon their face the collusion and fraud, and consent complained of. It follows necessarily that if complainant has any standing here he would have the right to attack the title of any purchaser from any of the distributees upon the ground that they took with notice of the fraud—are affected with knowledge of the invalidity of their titles because the records show affirmatively the things charged. This is undoubtedly true, and if permitted, must render all such titles under probate unmarketable.

These considerations affect not alone private, but public interests, and impose the duty of a suitor in equity to be diligent in discovering his rights as well as prompt in asserting them after they become known.

Considering the fact that complainant knew of General Williams' death, his place of residence, the existence and probate of a will, Judge Williams' executorship and of the income which Mrs. Goodrich had derived from the estate, this language of the court, in the case of Boren *v.* Boren, 85 S. W., 46 (where without any consideration the plaintiff was induced to execute a deed covering his interest to his brother by false statements and the working of a fraudulent scheme), is peculiarly applicable (page 52):

> "Again, it occurs to us that the alleged repeated assertion by appellee Boren to complainant, after the execution of the deed in question, that appellant had no interest in his father's estate, is against, rather than in support, of the contention that he was thereby lulled into nonaction or prevented from discovering the fraud. Such voluntary and needless assertions were certainly highly calculated to arouse suspicion in and suggest to any ordinary mind an inquiry into

> their truth. It must be assumed, in the absence of any averments to the contrary, that appellant was of sound mind; that he possessed average intelligence, and must have known that, unless deprived of it by will, he had an interest in his deceased father's estate. Such knowledge was sufficient to put him upon inquiry for the existence of such will. This will was probated, and became a matter of public record, easily accessible to appellant and open to his examination. * * * From the date of the probate of the will, appellant had ample means of detecting the fraud alleged to have been perpetrated upon him, and by the exercise of reasonable diligence, he would have seasonably discovered the truth, and his right to the property claimed in this suit."

The court found that, as a matter of law, in view of the facts disclosed by the complaint, the plaintiff could have discovered, by the use of reasonable diligence, through the means and avenues open to him, the fraud alleged to have been practiced.

The Boren case presents infinitely stronger reasons for equitable interposition than the one at bar. There the complaint abounded with charges of deception and fraud; the plaintiff was illiterate, was only 23 years of age; was imposed upon and deceived by his own brother, who persuaded him to believe that (although he actually owned the entire remainder), he had no interest in the estate, and that his deed was required as a mere matter of form in order to get money to buy his mother a home. The court said, page 51:

> "If, as has been well said, it appears from the complainant's own allegations that the means were at hand to readily discover the fraud complained of, and such means of information would have been used by a person of ordinary care and prudence in the transaction of his own business, then he will be held to have had notice of everything which a proper use of such means would have disclosed; and, a failure to avail himself of such means or avenues of informa-

> tion, appearing, *the issue presented is one of law—for the decision of the court,* and not a question of fact for the determination of the jury."

In that case actual fraud—moral turpitude of the worst character, swindling practiced by a brother in whom perfect confidence was reposed, upon a youth, inexperienced, illiterate, confiding—appeared. The court recognized the rule that a defendant will not be permitted to avail himself of the statute of limitations if by his own misrepresentation or fraud he has prevented the other party to the transaction from ascertaining his rights to the property involved in the controversy, but held that courts are bound by the doctrine that when the fraud is discovered, or when by the exercise of reasonable diligence it might have been discovered, the statute is put in motion from such date, and that relief will be barred when the statutory period, reckoned from that time, has expired; that the record of the will and its probate were matters of public record and fixed the time when limitations and laches attached, and, as they were open to inspection and examination by him was not prevented, a court of equity was bound to deny relief as a matter of law.

This position cannot be successfully controverted; complainant knew the law by presumption. He knew, then, that he was entitled to an interest in his wife's estate if she died intestate, and that she had an interest if General Williams died intestate. He knew that General Williams died and that his estate was being probated in San Francisco. Knowing the law, he knew the steps required thereby to administer and distribute the estate. He was in San Francisco, where the will and all of the probate proceedings were matters of record and open to his inspection and construction. The only concealment complained of consists in the failure of the distributees in their petitions to disclose his name, relationship to his wife, and claim to the estate. If this be so it must be held that, as matters of public record, each proceeding in the estate was constructive notice of what appeared

thereby from its date, and of everything which inquiry would have disclosed.

Vigoureux *v.* Murphy, 54 Cal., 346-352.
Graham *v.* Boston, etc., R. Co., 14 Fed., 753.
Leavenworth *v.* Chicago, etc., R. Co., 18 Fed., 209.
Church of Christ, etc., *v.* Reorganized Church, etc., 70 Fed., 179.
Eiffert *v.* Craps, 58 Fed., 470.
Gables *v.* Girard, 46 Fed., 500.

It is clear that the bill does not show any concealment by Judge Williams, nor from complainant by any of the distributees, and it is plain that both fraud and concealment must concur to justify a resort to equity. As everything upon which complainant bases his claim to relief were open and public acts, spread upon the records of the court, to which he had free access, Eiffert *v.* Craps, 58 Fed., 470, 472, and as he was bound at all times to know the state and condition of his own title, save as prevented from ascertaining the truth by affirmative acts, the rule that a person who is voluntarily blind as to facts concerning which false representations are made, cannot complain, if he has opportunity and means of ascertaining the truth, is strictly applicable.

One seeking to toll the statute by reason of fraudulent representations or concealment will not be absolved from the exercise of reasonable diligence by supinely relying upon one in whom he reposes great confidence.

Lewis *v.* Duncan, 71 Pac., 77.
Hammond *v.* Hopkins, 143 U. S., 244; 12 Sup. Ct., 448.

In Simpson *v.* Dalziel, 135 Cal., 602-3; the court says:

> "The only excuse for what otherwise would appear to be gross negligence on the part of the plaintiff is, that his confidence in his attorney was such that he had no reason to suspect, and did not suspect, that

fraud was being perpetrated upon him. But this confidence did not absolve the plaintiff from the exercise of reasonable or ordinary care."

In that case the fraud charged was that of an attorney in holding back part of the money received in settlement of a lawsuit, and the court squarely held that even the confidence which a client naturally reposes in his lawyer will not answer to excuse the client to use the means available to ascertain the condition of his business, and that his failure to know what he could have known had he been reasonably prudent and diligent, constituted inexcusable negligence.

The case of McMonigle *v.* McGlinn, 85 Fed., 88, is decisive of this case. The facts were that Hugh McGlinn died testate in San Francisco in 1879, leaving complainant one-half of his estate. Patrick McGlinn was appointed one of the executors. He persuaded complainant to give him a power of attorney to obtain her distributive share of the estate. There was distributed to him as attorney in fact $14,757.12, of which he remitted complainant $2,000; the remainder he invested in real estate, taking the title in his own name, and subsequently transferring it to his wife for love and affection. Complainant reposed special confidence in his honesty and integrity and made no investigation, largely because he warned her to refrain from seeking information or advice from others. He died and complainant sued his wife twelve years after he received the trust funds, as a grantee with knowledge of the facts and without consideration.

During all of the time complainant was a subject of Great Britain, unable to read or write, and residing in Providence, Rhode Island.

Judge Morrow held that complainant had failed to exercise that diligence with respect to the protection and enforcement of her rights which courts of equity invariably require of litigants seeking its aid; that the trust (as here) was an

implied one—a constructive trust; that with the strongest motives to action, the complainant was supine; that if underlying frauds existed, she did nothing to unearth them; that it was her duty to make the effort—and sustained the demurrer to the bill, both upon the ground that the claim was barred by section 343 of the Code of Civil Procedure of the State of California and because complainant had been guilty of laches; as to which latter ground it was said that the court might refuse to consider the case without inquiring whether there was a demurrer.

The authorities cited in support of the opinion are equally applicable here.

The death of Patrick McGlinn, as an important consideration in cases of this character, is referred to in the following language (substituting Williams for McGlinn):

> "The fact, also, that Judge Williams is dead, is a circumstance which appeals very strongly to a court of equity in passing upon the question of laches. As was well said by Mr. Chief Justice Fuller in Hammond *v.* Hopkins, 143 U. S., 224, 12 Sup. Ct., 435, 'in all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hourglass must supply the ravage of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

Chief Justice Fuller declares, in Hammond *v.* Hopkins, 143 U. S., 224, 36 L. Ed., 145:

> "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there

have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. *The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of.*"

And further (143 U. S., 273, L. Ed., 153):

"*Where death has intervened so that the mouth of one party is closed and those who represent his interests are not in a predicament to avail of the explanations which he might have made, out of the charities of the law, and in consideration of the fact that fraud is never to be presumed, but must always be proved, and proved clearly, the courts limit very much, in such cases, the measure of time within which they will grant relief, because the presumption comes in aid of the dead man that he has gone to his account with a clear conscience.*"

The bill of complaint in the suit at bar was filed on June 13, 1901, nearly five years ago. General Thomas H. Williams had been dead and letters testamentary had been issued to the executor of his will more than eighteen years before it was filed. More than eleven years had elapsed since the complainant's wife died, since he was in San Francisco, since he was "face to face" with the executor, the will, the probate records, with each and all of the defendants, with all the sources and means of knowledge. Nearly eight years had passed since the estate had been distributed, and since the distributees had been in the open, undisturbed, undisputed possession of its properties. By limitation the right of action is barred; for laches the complainant cannot be heard in a court of equity.

It may be that this court will feel disposed to follow the sometimes wholesome rule of following along the lines of least resistance and ending the case where it meets its first

insuperable barrier, leaving all other matters, however interesting and important in a general way, undetermined until a case shall arise to render their solution essential. At the threshold of the inquiries here it will become manifest to the court that the bill cannot be maintained because of laches in instituting the suit. Feeling that the court may apply the rule suggested, and pretermit all other questions (however sound and determinative our contentions as to each may be), and particularly in view of the contention of counsel that mere lapse of time will not militate against the complainant's right to be heard, we venture to superadd the considerations which controlled the Federal court in Arkansas, in a case decided about the time the suit at bar was argued, in applying limitation and laches under the equitable doctrine that means of knowledge is equivalent to actual knowledge, to the end that it may be plain that the most generous application of the principle invoked cannot relieve the complainant from the consequences of his neglect.

> Kansas City Southern Ry. Co. v. Stevenson, 135 Fed., 553.

Section 338, sub. 4, C. C. P., prescribes a period of three years for the commencement of

> "an action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

This means that no action can be commenced, on the ground of fraud or mistake, after the expiration of three years from the day the fraud or mistake was actually discovered, and it equally means that the time when complainant shall be presumed to have learned of the fraud or mis-

take is the time when he received sufficient information to lead him to the fact.

Wood *v.* Carpenter, 101 U. S., 135, 141; 25 L. Ed., 807.
Rugan *v.* Sabin, 53 Fed., 415.
Parker *v.* Kuhn, 21 Neb., 413, 421-426; 32 N. W., 74.
Wright *v.* Davis, 28 Neb., 479, 483; 44 N. W., 490.

In applying the doctrine of laches the rule is established that courts of equity are not bound by the statute of limitation, but they usually act or refuse to act in analogy to its provisions relating to actions at law of like character.

Rugan *v.* Sabin, 53 Fed., 415, 420.
Billings *v.* Smelting Co., 51 Fed., 338, 349.
Bogan *v.* Mortgage Co., 63 Fed., 192, 199.
Kinne *v.* Webb, 54 Fed., 34, 40.
Scheftel *v.* Hays, 58 Fed., 459, 460.
Wagner *v.* Baird, 7 How., 234, 258.
Godden *v.* Kimmell, 99 U. S., 201, 210.

The practical construction of this rule is that, under ordinary circumstances, a suit in equity will not be barred by laches before, and will be barred after, the expiration of the period limited by the statute.

> "But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."

The result is, of course, that a suit in equity on the ground of fraud will not be barred by laches in California in less than three years after the discovery or means of discovery of

the fraud, unless unusual circumstances make it inequitable to allow its prosecution. One of the circumstances which will induce a court of equity to apply the doctrine of laches in a shorter time than that fixed by the statute is the very one which is shown to exist here—the death of Judge Williams.

Kelley *v.* Boettcher, 85 Fed., 62.

This case also holds that when a suit is brought *within* the time fixed by the analogous statute the burden is on the defendant to show from the face of the bill that extraordinary circumstances exist which require the application of the doctrine of laches; but, when the suit is brought *after* the statutory time has elapsed, the burden is on the complainant to show by suitable averments in his bill that it would be inequitable to apply it to his case. Among the numerous cases cited by us it will appear that Wagner *v.* Baird, 7 How., 234; Godden *v.* Kimmell, 99 U. S., 201; Wood *v.* Carpenter, 101 U. S., 135, 139, and Rugan *v.* Sabin, 53 Fed., 415, 420, belong to the class of cases in which the doctrine of laches was applied after the statute had run.

This illustration, taken from Kelley *v.* Boettcher, *supra,* will immediately serve to distinguish a case where the court will refuse to apply the doctrine of laches within, and sometimes even after, the expiration of the lapse of the statutory period, under the maxim that no time runs against the victim of a fraud while its perpetrator successfully conceals it: The complainants lived in Illinois and were the heirs of a deceased owner of a mine situated in Colorado and knew nothing whatever of the property or of mining. The defrauding party lived in Colorado and knew all about the mine, its condition, history, value, and products; he went to Illinois and falsely represented to the heirs that no valuable ore had ever been discovered in the mine, that it had never been profitably worked, that it was flooded with water, and could not be examined, that it was practically worthless, that their

interest was not really worth more than $250. The heirs were thus persuaded to deed their interest for $1,000. The facts were that this interest was worth more than $800,000, that rich gold and silver had been discovered, and that such ore of the value of millions had been extracted, that the mine was not flooded, but was open and easy of examination. It also appeared, that to successfully cover and keep concealed the fraud, the mine was kept locked and barred, no one was allowed to enter, books of account were kept concealed, as was also the amount and value of the products of the mine, and no reliable information could be obtained upon the subject. The court held that, it appearing that it was impossible to establish or even to learn the facts, owing to their fraudulent and successful concealment, laches would not bar the claim.

That was a case of bargain and sale where fraudulent warranties were successfully imposed and concealed. There was no opportunity to learn the facts, and therefore no laches.

The case of Kansas City Southern Ry. Co. *v.* Stevenson, 135 Fed. Rep., 553, decided March 4, 1905, lucidly and forcibly states the rule which must control this case. There the president of a railroad company received donations and subsidies in his own name, in trust for the corporation. He finally resigned as president, but held the property, under claim of right, for a period beyond that limited by the statute for commencing an action to recover real property. In sustaining a demurrer to the bill on the ground that the cause of action was stale, the court quoted largely from State and Federal authority, among other cases from McGaughey *v.* Brown, 46 Ark., 34, where the court says:

> "It is argued further that Mrs. McGaughey, and her heirs after her death, held the land in trust for the heirs of Fountain Brown, and that the statute will not bar a trust. Express and positive trusts are certainly within the rule contended for. But this doc-

trine is subject to two qualifications, namely, that no circumstances exist to raise a presumption of the extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title (Angell on Lim.; Wood on Lim., 212, 213; Harriet *v.* Swan, 18 Ark., 495). The rule, with the exceptions, was clearly stated by Judge Fairchild in Brinkley *v.* Willis, 22 Ark. 6, and the benefit of the statute was denied an executor, ten years after his breach of duty, because the trust was still subsisting; the executor not having been discharged therefrom by the probate court. But this does not help the appellees' case, for, if we should regard James A. McGaughey as in possession of the estate in his own right, still the facts remain that he was regularly discharged from the trust by the probate court in 1870, and the lands were held adversely for more than seven years thereafter. The following language used in Clarke *v.* Boorman's Executor, 18 Wall., 493, 21 L. Ed., 904, is applicable to this case: 'It may be conceded that so long as a trustee continues to exercise his powers as trustee in regard to property, he can be called to account in regard to that trust. * * * But when he has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with the mantle of repose.' But trusts which arise from the operation of law (that is, constructive trusts) are subject to the operation of the statute. The possession of Mrs. McGaughey and her heirs falls under this class, and it was incumbent upon the appellees to assert their rights within the period limited by the statute after knowing the facts in relation thereto. Ashhurst's Appeal, 60 Pa., 290, 316. They seek to evade the force of the statute by contending that the appellant's title originated in a fraud which no time will bar. To warrant this conclusion not only must the trust be established, but the fraud must have been successfully concealed from the knowledge of the beneficiaries (Wood on Lim.,

sec. 275 *et seq.;* James *v.* James, 41 Ark., 301; Geisreiter *v.* Sevier, 33 Ark., 534; Meyer *v.* Quartermous, 28 Ark., 45). In Marsh *v.* Whitmore, 21 Wall., 178, 22 L. Ed., 482, the court quote approvingly this language from Badger *v.* Badger, 2 Wall., 95, 17 L. Ed., 836: 'The party who appeals to the chancellor in support of a claim, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to the earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill."

The court (Kansas City Southern Ry. Co. *v.* Stevenson) then quotes from Percy *v.* Cockrill, 53 Fed., 875:

> "The rule that length of time is no bar in equity to a suit for relief from an actual fraud or a constructive trust, clearly proved, which has been fraudulently and successfully concealed from the party aggrieved, has no application to this case subsequent to 1858. (Subsequent to October, 1893, in case at bar.) * * * Notice of facts and circumstances which would put a man of ordinary intelligence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it."

It will be seen from reading the bill that Judge Williams closed up his relation to the estate and was discharged as executor of the will, on January 5, 1897, when the decree of final distribution was rendered, and that the defendant distributees then entered into adverse possession of the estate under that decree.

This brings this case within the principles controlling the doctrine of laches as applied in the suit just reviewed, and shows clearly that the complainant has wholly failed to state facts warranting the equitable interposition of this court, and that the bill must be dismissed because his cause is stale.

Question 6. "Does the will suspend the absolute power of alienation of the property of the estate for a fixed term, not measured by the continuance of lives in being, and create a trust estate void for that reason?"

DISCUSSION OF ITEM FOUR OF THE WILL OF THOMAS H. WILLIAMS.

The complainant herein relies on the following allegation of his complaint (principally conclusions of law) found on page 6 thereof, as a basis for his contention that the trust set out in the will is invalid; that paragraph is as follows:

> "And your orator further shows unto your Honors, that under the laws of the State of California, and especially under sections 715, 716, 771, and 749 of the Civil Code of California, the trust attempted to be created in and by the said will was at the time of its creation, ever since has been, and now is, void; that the absolute power of alienation of the property of said Thomas H. Williams, said testator, included in said attempted trust, was by said will, and by the terms of the trust thereby attempted to be created, suspended for the term of three years, and not for a period measured by the continuance of lives in being; and that, as to the property included in said attempted trust, the said Thomas H. Williams died intestate, and that at his death the said property passed to, and vested in, his said heirs-at-law in the proportions before mentioned."

It will be seen that the complainant relies on sections 715, 716, 771, and 749 of the Civil Code of California. Those sections in the order named are as follows:

> "715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 772.
>
> "716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. *Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.*
>
> "771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715.
>
> "749. The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the Code."

Although it is the first paragraph of item 4 of the will which has caused the mischief, by the complainant's theory, we are quite willing to assume that the will should be construed as a whole, and that all provisions of the instrument applicable to what he denominates the invalid trust, may be taken into consideration. We quote those referred to by appellant:

> "Item 4. When the term of three years after my death, shall have elapsed, unless the executor, herein named, shall for good cause extend it for two years, or in case there be another executor, three of my

children, or representatives, shall by writing, extend it for two years, distribution of my estate, shall be made, as herein directed:

"First. There shall be set aside absolutely, in property or money, therefore realized from sales of property, the sum of two hundred ($200,000) thousand dollars, for the benefit of my daughter. Second: There shall be vested absolutely, in Percy, property or money, fifty thousand ($50,000) dollars. Third: From the remainder of the estate, there shall be set aside, the sum of one hundred thousand ($100,000) dollars, to each of my sons, Thomas H., Jr., Percy, and Bryant, or such proportions of those sums as the estate may be worth. Fourth: The sum of one thousand ($1,000) dollars each, shall be invested for the benefit of my niece Mary Thomas, and my grandson Frank Hansford, to be paid over, with interest at majority. Having thus disposed of five hundred and fifty-two ($552,000) thousand dollars, I direct that the remainder of my estate, shall be set aside, in equal shares, for my said daughter, Mary Bryant, said son, Thomas H., Jr., and said son Percy. But from the sums first herein devised, to each of my children, I direct the following deductions. The sums advanced to them respectively, before distribution, and from that of Thomas H., Jr., the sum of four thousand four hundred and eighty-six and 45/100 ($4,486.45) dollars, with interest thereon, at the rate of six (6) per cent. per annum, from the first day of August, A. D. 1884, said interest to be compounded annually, by adding to the principal. The distribution, herein to be made, of property, or money to be invested in property, and in separate, or joint parcels, as the interest of distributees may dictate. My daughter, however, shall for the first two hundred thousand ($200,000) dollars, select any pieces of property, or interest to that extent, undivided, she may direct or desire. The following plan, as may as near be, be followed for distribution. The court having jurisdiction of matters, pertaining to this will, shall appoint appraisers of the estate, each of the children interested being heard. The appraisers, consulting said children, shall appraise, and

make written return of description and value. The court shall hear objections to the return, and finally settle the matter. The children shall make their selections, either in pieces, or parcels, or parts in an entire property. If they cannot agree upon order, or choice in selection, it will be determined by the court, upon 'lot' or other design. When property has been selected, or an interest selected, the court shall enter a decree, or order, to that effect, vesting it for the benefit of the party named. To illustrate: Suppose my daughter shall take one hundred thousand dollars, or two hundred thousand in a given piece of property, the court shall by decree vest that interest for her benefit, in the property, in the same proportion, that the amount of selection bears to the whole value of the property, leaving the remainder to be selected by another, or others. I would advise that each of the three: Mary, Tom, and Percy, take equal proportions unsegregated, of unreclaimed swamp lands.

"Item 9. That no confusion may arise, in reference to title to any property of my estate, I hereby devise, *that all of the property of which I die the owner,* or which may in any way become part of my estate, *vest absolutely in my executor* herein appointed, and his successor, or successors, in office. *That the title thereto shall be held by him,* or his said successor, or successors in office, *until by death of my said several children, the property set aside for each, be vested in their respective heirs, as herein provided, said executor,* or his successor, or successors, *to hold said property, and every part thereof, in trust* for the uses and purposes in this will mentioned, and *for the use and benefit of my children as herein provided.*

"Item 13. This will is lengthy, but I hope it clearly expresses my purposes thus: That with the exception of fifty thousand ($50,000) dollars, the property of my estate is to be 'set aside' in and for the benefit of my children, Thomas H. Jr., Mary Bryant and Percy, and Bryant, at the time of distribution, in the proportion of two hundred thousand ($200,000.00) dollars to Mary, and one hundred thousand ($100,-

> 000.00) to each of the others, with division between Mary, Tom and Percy, of the remainder of the estate. That each of said children is to have the net income of the estate 'set aside' for them respectively. That the legal title is to be, and remain, in an executor of the whole estate and each part thereof, until death inflicts her blows. That when a child dies, the estate 'set aside' for him or her, vests absolutely in his or her heirs, as herein provided, except in case of Bryant, as hereinbefore mentioned, leaving the title in remainder, in the executor, until each of the children herein named be dead."

It is clear that if the trust be valid it is useless for the complainant to specify any fraud which induced him to believe that he had no interest in the estate, or to charge that his true interest was concealed from the probate department of the Superior Court of the City and County of San Francisco; or to allege that he did not receive constitutional notice of the time and place set for the hearing for the petition of final distribution of the estate; or to allege that there were any technical defects in the proceedings leading up to such final distribution. For, if the trusts created by such will are valid, the complainant has no pecuniary interest whatever in the estate of Thomas H. Williams, and cannot ask a court of equity to remedy defects where such remedy would be of no pecuniary value to him.

If this court should decide that the trusts created by the will are valid, it need go no further, and a decision on this point in favor of the defendants will prevent the necessity of examining into the defense of laches; the defense of the conclusiveness of the decree of distribution; the defense that the decree of distribution is a final construction of the provisions of the will; the defense that the decree of distribution was entered with due process of law; the defense that no extrinsic fraud is alleged in the bill; or the defense that this court has no jurisdiction of the cause of action. The defense that the trust clauses of the will of Thomas H. Williams are

valid disposes of all of the questions involved, if such defense be good.

Manifestly it was the intention of the testator to have the estate subdivided into as many parcels as there were life tenants—living children (Item 4). Each of the life tenants was to receive the income of his parcel until death. The legal title was to be and remain in the executor until "death inflicts her blows." That when a child (life tenant) should die the estate "set aside," *i. e.*, his share, should vest, *ipso facto* and immediately, absolutely and in possession, in his heirs (Items 9 and 13).

The remaindermen (the heirs of the life tenants provided by the will) were by the terms of the will vested with a determinable fee upon the death of the testator, and upon the death of the life tenants became at once vested with the full property, subject only to the liens of the decedent's debts, expenses of administration, etc.

San Francisco *v.* Olmstead, 88 Cal., 586.

Section 871, Civil Code, provides that when the purpose for which an express trust was created ceases the estate of the trustee also ceases.

In Weisenberg *v.* Truman, 58 Cal., 72, the court holds:

> "The purpose for which the trust was created being satisfied, the trust no longer existed; the trust estate has ended, and the functions of the trustee here ceased."

See also Schlessinger *v.* Mallard, 70 Cal., 331,

> as "the creation of a trust does not itself suspend the power of alienation unless a trust term in the property is created within which a sale or other alienation by the trustee would be in contravention of the trust,"
>
> Toland *v.* Toland, 123 Cal., 144,

and such term is beyond lives in being; and as the trust term in the property in this case ended with the lives in

being, when, by the express provisions of the will, there must be persons in being by whom the absolute interest in possession can be conveyed, the power of alienation thus far has not been unduly suspended.

Toland *v.* Toland, *supra.*

It is apparent that if all of the children of the testator had died within four months after his death the trust term would have ended; their children, or the remaindermen provided by the will, would have succeeded to the full title to the estate, coupled with the right of possession, and might have petitioned for partial distribution under section 1658, Code Civ. Pro.

> SEC. 1658. "At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate"

And by section 1661 such share *must* be delivered to the petitioner if it appears that the estate is relatively but little indebted and the share petitioned for may be allowed without loss to the creditors of the estate.

In re Crocker, 105 Cal., 368, 372.

A.

FOLLOWING THE WELL-KNOWN RULES OF CONSTRUCTION OF WILLS, ITEM 4 MUST BE INTERPRETED AS AN ADMINISTRATIVE PROVISION.

The bill is particularly directed toward the first paragraph of item 4 of the will, reading:

> "When the term of three years after my death shall have elapsed, unless the executor herein named shall, for good cause, extend it for two years, or in

> case there be another executor, three of my children or representatives shall, by writing, extend it for two years, distribution of my estate shall be made as herein directed."

The court will note that this item is addressed to George E. Williams, as executor, and not as trustee. It would be useless to cite authorities to the self-evident point that one person may hold both offices, but that the powers and duties of each office may and must be kept entirely distinct.

The clause referred to amounts to no more than a mere administrative direction. There being no express restriction, the statutory provisions relating to probate proceedings are paramount.

The probate court is vested with power to distribute an estate whenever it is ready for distribution. It is hardly necessary to argue that proceedings for distribution are purely statutory; that although the court while sitting as a court of probate has no other powers than those given to it by the statute (Estate of Pritchett, 52 Cal., 94; Buckley *v.* Superior Court, 102 Cal., 6), it has those powers and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction conferred upon it.

The statute is mandatory. Section 1665, Code of Civil Procedure, provides that upon the settlement of the final account of the executor, or at any subsequent time, upon proper application, the court *must* proceed to distribute the residue of the estate.

That section, in part, is as follows:

> "Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court *must* proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto."

Distribution cannot be postponed when the estate is ready to be distributed. Such a testamentary direction is a request, nothing more, directed to the discretionary powers of the court.

Estate of Pforr, 144 Cal., 122.
Estate of Campbell, 149 Cal., 716.

The grounds of the attack upon the validity of Item 4 of the will, as presented to the lower court, may be thus summarized:

1st. That the testator attempted to confer on the court a jurisdiction which it did not have and could not exercise.

2d. That the whole plan is uncertain and indefinite.

3d. That in the event of the death of any child before distribution the entire scheme fails.

4th. That under the will no title could vest in the beneficiaries except by decree of court, and that the probate court had no jurisdiction to make such a decree.

5th. That the method of distribution was unlawful.

A similar method of distributing an estate was before the Supreme Court of the State of California in the

Estate of Steele, 124 Cal., 533,

and in the same case the effect of the death of a child before distribution was discussed and disposed of, and the opinion disposes of most of the grounds upon which the attack on Item 4 is based. In the Steele case the trustee, to whom the bulk of the estate was bequeathed and devised, was directed to pay to each of the three children of the testator, "as they respectively attained their legal majority, a sum of money equal to one-ninth of the value of the trust estate *as appraised under authority of the proper court* at the time when the oldest of said three children shall attain her majority." In regard to this provision the court says (p. 541):

> "The obvious intention of the testator was that an equal and just distribution of the trust property should be made. The provision directing an appraisement is an administrative provision designed to secure that end, and *to which the trustee might properly have resorted had it not been mentioned in the will, or which the court, upon the proper application of any party interested, would compel.*"

We submit that the method of distribution provided for in the Steele case is substantially the method provided for in the will under discussion. The Supreme Court of the State approved of a plan of distribution which contemplated a reappraisement of the property left in the hands of an executor or trustee to be divided. Property belonging to an estate is distributed, not by acreage or square feet or front feet, but by the values of the respective parcels to be divided. These values may be found by the court upon the testimony of expert witnesses put upon the stand as partisans by the various persons interested in the distribution, but we have never heard it doubted that the court, in lieu of such evidence, has the inherent power to determine the value of the respective parcels by its own experts called "appraisers," who become officers of the court and who have no interests with any of the litigating parties. This was the plan directed by General Williams. This was the plan directed by the testator in the Steele case, and this plan has the stamp of approval of the Supreme Court of this State. Surely the clause in General Williams' will, that after the return made by the appraisers the surviving children should have the right of selection, does not interfere in any way with the general scheme. This power of selection was suggested in order to save labor to the court; but it was expressly provided that if choice or selection was found to be impossible the distribution of the various parcels was to be determined by the court. The suggestion that the court determine the distribution by "lot" need not be taken seriously, but frankly we believe that the drawing of straws might well determine what dispo-

sition should be made of two parcels of equal value, and we see no legal objection to such course if the court should determine to adopt it.

We do not know in what sense General Williams used the word "lot" in his will. If the learned counsel for complainant really mean that General Williams suggested some kind of a gambling scheme to the probate court, we would remind them that one of the primary meanings of the word is an "allotment," and "apportionment," or an "award," and to make such allotment, or apportionment, or award, is one of the duties of a probate court in entering a decree of distribution, whether directed by the testator or not. Counsel say in their brief, speaking of the plan of selection, that "this amounted to a power of allotment or appointment." But this power of allotment or appointment is one vested in the probate court by statute, and the direction in the will neither adds to nor takes from the powers or jurisdiction of the court in this particular.

Under the probate law of the State of California, the title to the property of a deceased person vests in his heirs, legatees or devisees immediately upon his death, subject to administration. The decree of distribution rendered by the probate court adds nothing to the title of such heirs, legatees or devisees, who establish their title as such, except definiteness in cases where the decree not only distributes, but partitions the property among those interested. It was this definiteness, as a natural result of partition, which General Williams intended to direct when he used the expression "when property has been selected or an interest selected, the court shall enter a decree or order to that effect vesting it for the benefit of the party named." Perhaps the use of the word "vesting" by General Williams was unfortunate. It was certainly so if its use gave rise to this protracted litigation. It might have been better for him to have used the word "distributing" or "partitioning," and thus have prevented this ground

of attack upon his will. But we submit that the word which he did use was and is synonymous with the words "distributing" or "partitioning," and that no other construction can be put upon it. He could not have intended to direct the court to enter a decree which gave a new title to the party selecting some particular parcel, because that party already had a vested interest in the property. All he could have meant was that the decree of the court should, by metes and bounds, "vest," or "partition," or "distribute" to some particular beneficiary a life estate in the property described, in lieu of the undivided interest which such beneficiary would take in common with the other beneficiaries, if partition were not made by such decree. What General Williams wanted to prevent was a decree of distribution which would vest in each of his beneficiaries an undivided interest in each particular parcel of property. He might well have said "upon final distribution, the court having jurisdiction of my estate shall partition the property for the benefit of the beneficiaries herein named." The laborious expressions used by him are to the same effect only.

In the Steele case the Supreme Court also answers the ground of attack suggested by counsel for complainant, that if any child of General Williams had died before distribution, the entire scheme provided by him would have failed, and on account of that possibility was void at its inception. This very point was raised in the Steele case and was disposed of very promptly by a ruling that in case of the death of any beneficiary before distribution, the trust would fail *as to such beneficiary,* but as to such beneficiary only, and that the share of such deceased beneficiary would "result" for the benefit of the heirs-at-law of the testator. "The possible death of any of the children named before distribution made to them under the trust cannot affect the present validity of the trust; but in the event of such death the trust would merely fail and determine for want of a beneficiary as to the interest of any deceased child."

Applying this test to the case at bar, no court could, at the inception of the probate proceedings, have determined that the scheme of distribution was invalid on account of the possibility of the death of one of the beneficiaries before the time for distribution. On examining the chronology of the Williams family the court will find that none of the children (except Sherrod, who was expressly disinherited,) died before the time set for distribution as claimed by complainant. Therefore as the only possible contingency which could have disturbed the distribution which it claimed was intended by General Williams, did not arise, the question presented by counsel for complainant is purely academic and governed by the ruling in the Steele case.

In re Phorr's Estate, 144 Cal., 122, the court says:

> "The testator has not forbidden the alienation of his estate during any fixed period of time, but in the directions to his executors he has fixed a limit after which the beneficiaries may enforce its sale. *It was not within his power to deprive the Superior Court of its power to direct a sale of his estate at any time, if necessary for the purposes of administration, nor is his will susceptible of such construction. So long as the administration of the estate is pending, the executors are at all times subject to the control and direction of the Superior Court,* and this court may, at any time, order a sale of the lands, if necessary for the payment of creditors, or when it will be for the advantage of those interested in the estate (Code of Civil Procedure, sec. 1543)."

That is to say, construing the clauses referred to as administrative provisions only, the court held that the direction or command that the property be sold (in our case, distributed to the life tenants) *after* a certain time, was no prohibition against its being sold (distributed), prior to such time, and that, therefore, section 715 of the Civil Code of California was not contravened.

In Toland *v.* Toland, 123 Cal., 140, the will directed the lands to be sold "so soon as the leases of rented land are canceled."

The court held that this direction designated a point of time after which the beneficiaries might enforce a sale, but did not postpone the right to make the sale until the expiration of the terms created by the leases, and that therefore no perpetuity was created. The same rule is laid down in New York, in which the statutory prohibition against perpetuities is the same as that laid down by section 715 of the Civil Code of California.

Robert *v.* Corning, 89 N. Y., 225.
Deegan *v.* Wade, 134 N. Y., 573.

As an administrative provision, item 4 of the will must give way to the positive provisions of the statute in regard to the time within which estates may be distributed, and in spite of its directions legatees and devisees could have applied for distribution before the expiration of the three years' term mentioned in said item. Code of Civil Procedure, secs. 1651, 1652, 1664 and 1665.

Estate of Pritchett, 51 Cal., 568.
Estate of Pritchett, 52 Cal., 94.
Estate of Ricaud, 57 Cal., 421.
Smith *v.* Westerfield, 88 Cal., 380.

There are certain rules for the interpretation of wills which are so well established that we are almost ashamed to cite them. The following sections of the Civil Code are merely affirmative of the common law:

> SEC. 1317. "A will is to be construed according to the intention of the testator."
>
> SEC. 1321. "All the parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole; but where several

parts are absolutely irreconcilable, the latter must prevail."

SEC. 1325. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative."

To form one consistent whole, item 4 must be construed as an administrative provision, and not as creating a trust estate, for the reason that the testator elsewhere (in items 6, 9 and 13) created trust estates covering all of his property except specific legacies. To interpret item 4 as creating a trust estate, would not follow the rule of giving to every expression some effect. To so interpret this item would render either it or items 6, 9 and 13 inoperative, as with such a construction there would be two separate, distinct and conflicting trusts covering the same property. In order to make each one of these four items operative, item 4 must be interpreted as an administrative provision and the other items must be interpreted as expressing the intention of the testator to create certain trusts governed by certain lives in being.

RECAPITULATION.

1st. The method of partitioning an estate by an appraisement of the various parcels has met the approval of the Supreme Court of the State of California.

2nd. The power given to the children to agree upon the parcels which should be distributed to them, respectively, was not invalid. The children would have this right in any event.

3rd. The suggestion to the court that if the children could not agree, the parcels be divided by lot, is not invalid as conferring upon the court a jurisdiction which it did not otherwise have. All probate courts have this power by virtue of the statutes.

4th. The possibility of the death of one of the children before distribution does not make the entire scheme fail. This was also determined in the Steele case. As none of the children died before the expiration of the three years there is no actual question for the court to decide.

5th. Item 4 is an administrative provision only.

B.

Merger of Estates.

If, in spite of the foregoing position, the court should hold that item 4 created an estate in George E. Williams which suspended the power of alienation for a term of years, then such estate became merged in the greater estate devised to the same person by the provisions of item 6, 9 and 13.

It is a well-known legal principle that when a superior and inferior estate in lands meet in the same person, the inferior estate merges in the superior. We apologize for citing elementary books on this proposition, but the doctrine is so old and well established that we cannot find it laid down in any court of law of modern times.

20 Amer. & Eng. Ency. of Law, 2nd Ed., 588, and cases cited in note.

Cooley's Blackstone, Book 2, page 177.

1st Washburn on Real Property, page 108, par. 51.

2 Rapalje & Lawrence Law Dictionary, 815.

"An estate for years, no matter what its length, is inferior to an estate for life."

See the authorities last above cited.

"Estates of inheritance and for life are called estates of freehold; estates for years are chattels real."

C. C., sec. 765.

"An estate during the life of a third person, whether limited to heirs, or otherwise, is a freehold."

C. C., sec. 766.

The above is the strict rule universally enforced in courts of law. We admit that the equitable rule is not as inflexible. In courts of equity the question as to whether or not the doctrine of merger will be applied is determined in the first instance by the intention of the party in whom the estates unite. But where such intention cannot be determined by the party's express declaration, such intention will be presumed in accordance with his interests as disclosed by an examination of all the circumstances in the case.

20 Amer. & Eng. Ency. of Law, 2nd Ed., 590, 591.

There being no express declaration from or election on the part of George E. Williams, the court must examine all the circumstances of the case in order to determine whether the interests of George E. Williams and of his beneficiaries require the application of the legal rule or require that the legal rule should not be enforced.

We submit that the interests of Williams and of his beneficiaries require the strict legal rule to be enforced. If the court should interpret item 4 as creating a trust estate and should decline to apply the doctrine of merger, it might then be urged that Williams' title and that of his beneficiaries was defeated. The interests of Williams, and those who claim under him, are clearly subserved by merging the lesser estate in the greater, by merging the estate for years into the estates for life, thus supporting, without question, not only the title of Williams and his beneficiaries, but also carrying out to its full extent the intent of the testator. In the case of

Wehrhane *v.* Safe Deposit & Trust Co., 89 Md., 179,

the Maryland Court of Appeals determined that, under equitable rules, two trust estates were merged, or not, according to the evident intention of the trustor. Applying this rule, the court held that there was no merger, as such a merger would defeat the intention of the testatrix.

We submit that the equitable rule works both ways, and that such rule can be stated as follows:

That if it be necessary for the purposes of justice, or to effect the intent of the donor, that the two estates should be kept distinct, there will be no merger, but if it is necessary for the purposes of justice, or to effect the intent of the donor that the lesser estate should be absorbed by the greater, the doctrine of merger will be applied.

It must be borne in mind by the court that the *prima facie* rule is that in the absence of special circumstances, in equity, as in law, merger will take place.

Thus in

Forbes *v.* Moffatt, 18 Vesey, Jr., 385,

the Master of the Rolls held that the question of merger depended upon the intention, actual or presumed, of the person in whom the interests were united, adding,

> "where, as in most instances, it is with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink without some act by him to keep it on foot."

And in Starr *v.* Ellis, 6 Johnson's Chancery Rep., 393, Chancellor Kent said:

> "Unless some beneficial interest be shown to require it to be kept up, or the intention to keep up the charge be immediately and duly declared, the conclusion is that it was purchased in or rather paid off and satisfied, in order to exonerate the estate. * * * A court of equity will keep an encumbrance alive or consider it extinguished as will best serve the purposes of justice, and the actual and just intention of the party. * * * The general rule is that the union of the estates will create a merger unless there be some beneficial purpose or some declared intent to prevent it."

The same rule is laid down in

Fowler *v.* Fay, 62 Ill., 37.

20 Amer. & Eng. Ency. of Law, 590, and note 10.

Savage, C. J., in James *v.* Morey, 2 Cowen, 313, said:

> "when the legal and equitable estates become united in the same person, the equitable is merged in the legal estate unless the party in whom they unite manifests an intention to keep them separate or it is manifestly his interest to keep them so; but when it is indifferent whether they unite or not, or when an intention to unite them is shown, then they shall be united."

C.

Separability of the Invalid Trusts from the Valid Trusts.

Even if it should be held that item 4 created a trust estate, void for the reason that it is an improper restraint upon alienation, and that such estate did not merge in the greater life estates, created by the subsequent items of the will, it does not follow, as claimed by the complainant, that General Williams died intestate as to the property covered by item 4.

The leading case on perpetuities in California is,

In re Walkerly, 108 Cal., 627.

In this case a devise of a block in San Francisco was made to certain trustees to hold for twenty-five years, and the court held such trust to be void as in contravention of sections 715, 716, 749 and 771 of the Civil Code, the very sections which complainant relies upon in the case at bar. But the court will observe that the Walkerly will made no other disposition of the block in question. The void trust was a part of the residuary devise, and the court was therefore compelled to

declare intestacy in regard to the property covered by the void trust, saying (page 652):

> "The intestacy of the testator as to the Walkerly block is the harsh result which must follow this void trust and the property will descend to his heirs. It is true that such was not the testator's intent, but a testator must do more than merely evince an intention to disinherit before the heir's right of succession can be cut off. He must make a valid disposition of his property."

The harsh result in the Walkerly case is not necessary in the case at bar, because outside of the so-called void trust, the testator has made a valid disposition of all of his property by will. The rule in such cases is that, where an invalid trust is inseparably united and interwoven with a valid trust, where the two are evidently a portion of a general trust scheme of the testator, both must fall. For this reason the Supreme Court of California held that the trust in personal property created by the Fair will was invalid (136 Cal., 79), the trust in the real property having been previously determined to be void (132 Cal., 552).

Taken by itself, the trust created by Fair in personal property would have been valid, but the trust in real property having been held to be invalid, such decision destroyed the whole scheme of the will and defeated the intent of the testator. Yet the Supreme Court in that decision admitted the possibility of separating the valid from the invalid trusts, cutting out the latter and sustaining the former, citing

Kalish *v.* Kalish, 166 N. Y., 368,

from which decision the court quotes:

> "It is possible to cut out the invalid provisions so as to leave intact the parts that are valid and to preserve the general plan of the testator."

Adding,

> "this is the meaning of section 1317 of the Civil Code where the word 'possible' is used in the sense given to it in the above quotation from Kalish *v.* Kalish."

Section 1317 of the Civil Code reads as follows:

> "A will is to be construed according to the intention of the testator. *Where his intention cannot have effect to its full extent, it must have effect as far as possible.*"

It is for the purpose of carrying out the rule laid down in the latter half of the section above quoted that we urge upon this court the possibility of separating the valid and so-called invalid trusts of the will under discussion.

The case of Kalish *v.* Kalish requires particular consideration, as it seems to be exactly in point. The Kalish will created a valid life estate followed by an intermediate trust which was void as in contravention of the statute against perpetuities, and then created an ultimate valid trust and good remainders in favor of the same legatees as in the void trust and in the same proportion. The void trust was on all fours with that created by item 4, if it be held that such item creates any trust whatever. The trust was to continue for five years after the decease of testator's widow, and for such further time as in the opinion of the executors would be for the best interest of the estate. This intermediate trust was held void as it suspended the absolute power of alienation for a longer period than two lives in being at the creation of the estate. But the court held that declaring the intermediate trust void and expunging it from the will did not invalidate the ultimate trust and remainders, but that they took effect immediately on the termination of the first life estate. After deciding that the intermediate trust for five years is void as creating a perpetuity, the court says:

> "We now come to what may be called the third division of this will, which embraces the ultimate

trust and the remainders. These provisions, standing by themselves, are clearly valid. At this point the question arises whether they are so independent of and separable from the void intermediate trust that the latter may be eliminated from the will, and the two valid parts joined together, without destroying or changing in its essential features, the general testamentary scheme embodied in the instrument. What were the prominent features in this scheme? First. A life estate in the widow, with power of sale in the executors with the widow's consent. Second. A trust for five years, with an absolute power of sale in executors, during which period the three daughters were to have the annuities above mentioned, and two of them, together with their brother, Richard, were to have the use of certain real estate, while the executors were to hold and manage the property and accumulate and reinvest the surplus. Third. The trust for the daughter, Fannie, during her life, with remainder over after her death; a specific legacy to the plaintiff, and remainders of the residue of the testator's estate to his other children.

"Let us now stop to inquire what will happen if the void trust is lifted out of the will, and the first and third sections of the will are held valid. The only part of the testamentary scheme that will fail is that which attempts to defer the time of distribution for five years, during which Annie and Bertha are to have their annuities and the use of the homestead, or a substitute therefor, and during which the daughter, Fannie, is to have her annuity. It happens that the annuity to the latter is the exact equivalent of interest at five per cent. upon the fund provided for in the ultimate trust in her favor, so that she would lose nothing by the change. In the absence of knowledge as to the extent of the testator's estate, it is not unfair to assume that the annuities to the other daughters fairly represent the returns which they may expect to receive from their respective shares after distribution. In that event they will sustain no loss, except that occasioned by being deprived of the use of the homestead, or some other place instead of it. In all other respects the will stands as the

testator made it, and the main features of his testamentary plan will be carried out. What will be the result if we decide that the ultimate trust and remainders are so far dependent upon the void intermediate trust that the former cannot take effect until the expiration of the period during which the latter was to run? It would follow, as a logical sequence, that the testator died intestate at least as to the five year period fixed for the continuance of the void trust, and possibly as to all his property, except the widow's life estate. The latter contingency would entail the utter destruction of the testator's plan. The former would create a condition even worse than that. In case of complete intestacy, after the expiration of the widow's life estate, all the heirs at law of the testator would at least be upon an equal footing and would know just what to expect, but with the valid life estate, followed by intestacy for a term of five years, which in turn is succeeded by an unassailable trust and valid testamentary remainders, who could foretell the end as between the disinherited and hostile plaintiff and the heirs at law, who, as legatees are to take the substance of the estate? The question carries its own answer, and clearly presents the situation that is possible in theory, but utterly impracticable for any purpose except to waste this estate in litigation.

"Having demonstrated, as we think, that it is not only for the interest of all concerned in the estate, except the plaintiff, but also in direct furtherance of the testator's plan, to uphold this will by simply eliminating the void intermediate trust and its necessary incidents, we have now to inquire whether there is any legal obstacle to such a course. It is axiomatic that courts cannot make new wills for testators who have failed to make valid wills for themselves. While recognizing the force of this truth, courts have from the earliest times been compelled to change between alternatives of setting aside certain wills altogether, or of cutting out simply their void provisions. This necessity has led to the rule which is now firmly established in this state—that, when the several parts of a will are so intermingled or

interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be. This case seems to present a fair opportunity for the application of the latter rule. Here we are not required to make a new will for the testator. We have a valid life estate, followed by a void intermediate trust for five years, succeeded by a valid ultimate trust and good remainders. The void intermediate trust is for the benefit of the same legatees who take under the ultimate trust and remainders, respectively. The excision of the void trust simply gives immediate effect to those ulterior devises, which, under it, were to be postponed for five years. The same persons take in the same proportions as before. By way of recapitulation, we therefore conclude that equity and the decided cases concur in requiring us to hold that the invalid parts of this will can be expunged without destroying the will as a whole, or creating even partial intestacy. The life estate with the power of sale during its existence, subject to the widow's consent, can stand. The succeeding trust and its accompanying power of sale, with its incidental direction regarding the occupation of the homestead, or its substitute, are declared void. The ultimate trust and the remainders are held valid to take effect at the conclusion of the life estate."

Although we have quoted very fully from the decision, we would ask this court to read the whole opinion, as a long line of authorities is cited by the court in support of the quotation.

> "When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately and upholding one, although the other fails. And the courts naturally and properly lean to construe gifts separately *when it can be done.*"
> Gray on Perpetuities, sec. 341.

"Where the testator's main scheme is valid, it will not be destroyed by the presence of provisions which effect an illegal suspension, if these provisions are separable and not essential to the proper harmony and proportion of the whole; for then they may be cut off."

Chaplin on Suspension of the Power of Alienation, 481.

"In all cases where an invalid provision is separable and is not an essential feature of an entire scheme, it may be cut off without destroying the general design. * * * And where an estate is vested in a trustee upon several independent and separable trusts, some of which are legal, while others are in contravention of the statute concerning suspension, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts."

Chaplin, sec. 482.

"Independent and separable provisions of a will containing valid trusts as to personal property, are not affected by the invalidity of a trust to convey real property if it does not affect the main scheme of the testator."

Estate of Pichoir, 139 Cal., 682.
Estate of Willey, 128 Cal., 1.

In this case the Supreme Court "lifted" a trust creating a perpetuity out of a deed, enforcing the main trust clauses created by such deed. We quote from pages 10, 11 and 12:

"The main point of respondents—at least, the one most extensively argued and most strenuously insisted on is that the tenth clause of the deed is void, because it creates a perpetuity, which is not for eleemosynary purposes, and that being for an unascertainable portion of the estate and the other trusts being dependent on it, the whole fails. * * * We will assume for the purposes of the case that this trust being for the preservation of a single cemetery lot is not for a charity, and therefore invalid; but we do not agree with the respondents that this vitiates all

or any of the other declared trusts. Counsel for respondents repeatedly speak of this tenth clause as establishing 'the primary trust'; but we do not see that its relative position in the deed, or its magnitude or importance, or the whole deed construed together, or the evident main purpose of the trustor to be gleaned from the whole instrument, at all warrants the assertion that the trust declared in the tenth clause should be considered as a primary trust; and it is not so interwoven with the entire deed that it cannot be easily separated from the other trusts so as not to invalidate the latter. The rule of construction involved here, as crystallized in section 1317 of the Civil Code, is that: 'A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.' The principle which should govern courts in determining questions like the one now under review, whether they arise out of wills or deeds, is expressed by the maxim, *Ut res magis valeat quam pereat;* and, under the inspiration of that maxim, courts have firmly established the principle that valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries. * * * And the rule is naturally and justly applicable to the case at bar. By the clauses of the deed which precede the tenth, the trustees are to receive all the income of the property conveyed and to pay it annually to a large number of named beneficiaries; and, afterward, it is provided by the tenth clause that there shall be retained from the aggregate amount of the income and annuities twenty-five dollars, or as much more as may be necessary to care for the cemetery lot. It requires no strained view to see that this provision is incidental and subordinate to the main scheme, and is a mere charge upon the bequests or annuities; and that if the charge be invalid the beneficiaries take the bequests free of the invalid charge. The valid trusts can be easily carried into effect, after

eliminating the tenth clause, without interfering with what were evidently the main purposes of the trustor, and without doing any injustice whatever to any one of the other beneficiaries. The reservation for the cemetery lot is in an independent and single clause; it appears in the instrument after clauses which dispose of the entire income; it is easily separable from all the other provisions of the instrument, and, therefore, its invalidity does not carry with it, or affect, the trusts which are valid."

Nellis *v.* Rickard, 133 Cal., 647.

"A deed creating express trusts intended primarily to secure the payment of the entire income of the trust property to the daughter of the trustor, during the period of her life, is valid as to her, and is separable from contingent trusts in favor of her children or grandchildren, to take effect after her death, and no invalidity of the latter trusts can affect the validity of trusts in her favor."

In Bank *v.* Montgomery, 146 Cal., 746, the defendant claimed under a deed, the habendum clause of which reads as follows (p. 747):

"To have and to hold said premises for the following uses and purposes, and none other, viz:

" 'In trust to lease said premises not exceeding a term of five years, to collect the rents thereof and to pay out of the same all taxes, assessments and charges and retain a reasonable sum for the care and business thereof, and to pay to my son Richard H. McDonald the net rentals so long as he shall live and upon his death to convey to any child or children hereafter born to him or the issue of a child not living so born to him said property; but in the event he shall not have such child or children then my trustee shall convey said property to the child or children or the issue of any child not living of my daughter Mrs. Mattie Spencer share and share alike."

The court held (pages 747-749):

"So far as this deed purports to create a trust for the conveyance of the property upon the death of the

son, it must be held to be void under the decisions of this court. The trust to lease the property, collect the rents and to pay the net results to the son so long as he shall live, is, however, one authorized by the law of this State. The question then arises as to whether this valid provision is so interwoven with the invalid one, that the invalid provision cannot be eliminated without interfering with and changing the main scheme of the grantor. If not, it will stand (Estate of Pichoir, 139 Cal., 682; Nellis *v.* Rickard, 133 Cal., 617, and cases there cited) and the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trust, and will be void only as to the invalid trust."

"We think there can be no doubt that the two attempted trusts are severable. It is impossible to distinguish this deed of trust, so far as this question is concerned, from the deed made by the same grantor, considered in Nellis *v.* Rickard, *supra*, under which there was a valid trust for the benefit of Mrs. Spencer for her life, and an attempted trust for the benefit of her children, after her death, which latter trust was void because of suspension of alienation beyond the legal period. This court said in that case: 'Looking at the deed before us, what seems to us to be intended as the primary trust is the trust for the benefit of Mrs. Spencer, and the ulterior contingent limitation is easily separable from the primary trust, and is but incidental, its purpose being to provide for a contingency which may never arise, since Mrs. Spencer may outlive all her children, and the failure of the provision as to them would not affect the trust as to her.'

"The same, in effect, may be said with equal force, of her deed here involved.

"The case is clearly distinguished from Estate of Fair (132 Cal., 523 and 136 Cal., 79), where it was held that the asserted estate of the trustees for life in the realty, and the trust as to personal property, fell with the trust to convey, because they could not be separated therefrom without destroying the whole scheme of the testator. In Estate of Pichoir, *supra*, this court, in holding that a trust as to personalty

was not so inseparably blended with an invalid trust as to realty as to make it necessary to hold that the trust as to the personalty was also void, fully discussed in the Fair case, and the considerations compelling the decisions therein (139 Cal., 686, 688). What was said by the court in that case and in the opinions in the Fair case, show that the court considered that the several trusts in the Fair will were all parts of an exceedingly complicated scheme, so inseparably blended that the settled purpose of the testator would be entirely frustrated were a portion only of the scheme adhered to. All must stand or fall together. In the Fair case, reported in 136 Cal., 79, it was said that to hold 'that the testator, if he had known that his attempted disposition of the realty was invalid, and that upon his death his vast amount of real property worth many millions of dollars, would go immediately in fee simple to his children, would have given to them also the income of the personal property, would be to indulge in a most impossible supposition and to violate the settled law on the subject.'

"No such conditions exist here. As in the case of Nellis *v.* Rickard, *supra*, the trust for the benefit of the son, during his life, was a separate independent scheme, apparently the primary trust, and the invalid trust but incidental. It was plainly the intention of the grantor that, whatever might ultimately become of the property, his son should have the net income so long as he lived, and we see no good reason why effect cannot be given to such intention."

In re Heywood's Estate, 148 Cal., 184, 82 Pac., 755.

So, in the case at bar, it was plainly the intention of the testator that whether distribution were postponed for three years or not, his sole estate should vest in his brother in trust for his children and their issue, or in default of issue, in their survivors or survivor. This was the *primary* trust contemplated by the testator and in his recapitulation of his intention in item 13 he emphasizes this fact and omits all reference to that portion of item 4 contested in this case.

To apply the above rule of separability, it is necessary to examine the "testator's plan" as it is called in the Kalish case, or "the testator's trust scheme," as it is described in the Fair case, with particular reference to the duty imposed by section 1317 of the Civil Code of giving to the testator's intention as much effect as is possible. That there should be no doubt in regard to his "plan;" that there should be no doubt in regard to the "whole scheme of the will;" that there should be no doubt in regard to his "trust scheme," General Williams closed his will by the insertion of item 13, reading:

> "This will is lengthy, but I hope it clearly expresses my purpose, thus; that with the exception of Fifty thousand dollars ($50,000.00) the property of my estate is to be 'set aside' in and for the benefit of my children Thomas H., Jr., Mary Bryant, and Percy and Bryant, at the time of distribution in the proportion of Two hundred thousand dollars ($200,000) to Mary and One hundred thousand ($100,000) dollars to each of the others, with a division between Mary, Tom and Percy of the remainder of the estate. That each of said children is to have the net income of the estate 'set aside' for them respectively. That the legal title is to be and remain in an executor of the whole estate and each part thereof, *until death inflicts her blows.* That when a child dies the estate 'set aside' for him or her vests absolutely in his or her heirs *as herein provided* except in case of Bryant as hereinbefore mentioned, leaving the title in remainder in the executor until each of the children herein named be dead."

Among the heirs of Mary "as herein provided," her surviving husband was not included. By item 6 of the will Mary's heirs were designated to be her child or children, or grandchildren, or brothers surviving her. Consequently, the general plan or trust scheme of General Williams did not make any provision for the complainant.

Of this general plan or trust scheme, item 4 forms no part. We submit that it cannot be held to be so inseparably

united and interwoven with the general plan that it cannot be cut out if it be held to be void. If it be an unlawful restraint upon alienation and not a mere administrative provision, we submit that it falls directly within the decision of Kalish *v.* Kalish, approved by the supreme court of California in the Fair case. The plan of General Williams, the trust scheme set forth by him in items 6, 9 and 13, is unquestionably valid and supports the decree of distribution.

THE BILL OF COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO ENTITLE THE COMPLAINANT TO ANY RELIEF IN A COURT OF EQUITY.

The charging part of the bill is a complicated maze of legal conclusions, opprobrious epithets, and offensive adjectives and adverbs, without any facts to support them.

> "Conclusions of law, if correct, are useless, and, if erroneous, worse than useless."
>
> Callahan *v.* Broderick, 124 Cal., 80, 82-83.
> Ohm *v.* San Francisco, 92 Cal., 437, 449-450.
> Salem *v.* Lane & Bodley Co., 82 Am. St., 481, 487; 189 Ill., 593, 602; 60 N. E., 37, 39.

Upon this principle it is universally held that a demurrer does not admit conclusions of law. They neither bind nor conclude the pleader; nor are they susceptible of denial or proof.

> Salem *v.* Lane & Bodley Co., 82 Am. St. Rep., 481, 487.
>
> Pullman Palace Car Co. *v.* Railway Co., 115 U. S., 587, 596.

Hence even the failure to demur or otherwise object to a complaint, insufficient in substance to entitle the complainant to relief, is not a waiver of the objection, nor is it an

admission that it is sufficient in law to warrant any relief thereon; even a default would have no such effect.

Marsh *v.* Whitmore, 21 Wall., 178, 185.
Sullivan *v.* Portland, etc., R. R. Co., 94 U. S., 806, 811.
Richards *v.* Mackall, 124 U. S., 183.
Badger *v.* Badger, 2 Wall., 94.
Brown *v.* County of Buena Vista, 95 U. S., 160.
Hume *v.* Beale's Executor, 17 Wall., 336.
Hayward *v.* Bank, 96 U. S., 611.
McQuiddy *v.* Ware, 20 Wall., 19.
Harris *v.* Hillegrass, 66 Cal., 79, 80.
Godden *v.* Kimmell, 99 U. S., 211.
Teall *v.* Slaven, 40 Fed., 781.

In Wong Him *v.* Callahan *et al.*, 119 Fed., 381, De Haven, District Judge, said (pp. 382-3):

> "The defendants are in default, but this does not entitle the complainant to a decree *pro confesso*, unless the allegations of the bill are sufficient to support a decree in his favor. Thompson *v.* Wooster, 114 U. S. 104; 5 Sup. Ct., 788; 29 L. Ed., 105. The bill does not, in my opinion, state facts sufficient to entitle the complainant to the relief prayed for, nor to any relief, and for this reason must be dismissed and it is accordingly so ordered."
>
> W. U. T. Co. *v.* Sklar, 123 Fed., 295, 300-301.

Such a bill as this is very happily and forcibly characterized, and the rule we contend for clearly stated in

Lumley *v.* Wabash Ry. Co., 71 Fed., 21,

where the court, on pages 27 and 28, said:

> "The free use of the epithets 'fraudulent,' 'fraudulently' and 'surreptitiously' neither informs the conscience of the court of the facts of the case upon

which it is asked to act, nor enables the defendant to meet the accusation of wrongdoing made against him. The pleading is open to the further objection that it is lacking in certainty and positiveness, and its charges are contingently and alternatively stated. It is not enough to denounce and opprobriously characterize the party, or transaction assailed, but the facts should be so stated that the nature of the matter in issue will *prima facie* warrant the relief sought. Brooks *v.* O'Hara, 8 Fed., 531; Hazard *v.* Griswald, 21 Fed., 178, Fogg *v.* Blair, 139 U. S., 118, 11 Sup Ct., 476. 'A court of equity when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them.' Per Grier, J., in Magniac *v.* Thomson, 2 Wall, Jr., 254, Fed Cas. No. 8,957. Such epithets are merely allegations of conclusions of law, which a demurrer does not admit. Ambler *v.* Choteau, 107 U. S., 586, 591; 1 Sup. Ct. Rep., 556; Fogg *v.* Blair, 139 U. S., 118, 11 Sup. Ct. Rep., 476; Dillion *v.* Barnard, 21 Wall., 430; U. S. *v.* Ames, 99 U. S., 35, 45; Pullman Palace Car Co. *v.* Missouri Pac. Ry. Co., 115 U. S., 587, 6 Sup. Ct. Rep., 194.

As has been said by Mr. Chief Justice Fuller, in the case of Kent *v.* Lake Superior Ship Canal, Railway & Iron Co., 12 Sup. Ct., 655:

> "Epithets do not make out fraud, and the averments are substantially of legal conclusions not admitted by the demurrer (Fogg *v.* Blair, 139 U. S., 118, 127). * * * If as asserted by his counsel, appellant' 'remedy grows out of the fraud, his right arises out of the errors committed to his prejudice,' then the remedy ought to have been sought in the court which rendered the decree."

Where, as here, the bill shows upon its face that complainant by reason of lapse of time and his own gross laches, has

forfeited any claim to relief from a court of equity, the objection may properly be taken by demurrer.

Speidel *v.* Henrici, 120 U. S., 377, 387.
Maxwell *v.* Kennedy, 8 How., 210.
National Bank *v.* Carpenter, 101 U. S., 567.
Lansdale *v.* Smith, 106 U. S., 391.
Bliss *v.* Prichard, 67 Mo., 181, 188-191.
Hill on Trustees, 267.
Edwards *v.* Mercantile Co., 124 Fed., 391-392.
Barnold *v.* Simpson, 114 Fed., 368-369.
Shain *v.* Sresovich, 104 Cal., 406.
Robertson *v.* Burrell, 110 Cal., 578.
Burling *v.* Newlands, 112 Cal., 500, and 39 Pac., 49.
Sullivan *v.* Railroad Co., 94 U. S., 811.

The bill upon its face shows that the complainant has no standing in a court of equity, and that the demurrers must be sustained.

Stripped of legal conclusions, the bill states nothing to justify the court in hearing the cause upon its merits. No merits appear. What Judge Williams said to the complainant is not material, because it was his opinion merely (Estate of Willey, 140 Cal., 238, 241, 242); because it is admitted that it was his honest opinion; because it was his duty to defend the will; because the will itself and all sources of information and knowledge were, and always have been, open and available to complainant; because what Judge Williams said cannot bind or affect the defendants; because Judge Williams is dead; because the title to the estate has vested in the distributees by a final and conclusive decree of distribution, and as well by operation of law through the statute of limitation.

As to the fraud alleged to have been committed by the distributees, it appears to have been intrinsic, concerning the issue presented by the petition for final distribution—the

very subject matter of inquiry before the court, and therefore concluded by the decree.

The complainant has not brought himself within the purview of the following rules:

> "All the authorities agree in the proposition that the party seeking to excuse his delay in asking relief must show that his ignorance was not negligent; that he remained ignorant without any fault of his own; that he could not by reasonable diligence have discovered the fraud sooner, and 'where the means of knowledge are open to him, he is chargeable with knowledge from the date when he should have ascertained the fact.' "
>
> Foster *v.* Mansfield R. Co., 36 Fed., 638.

> "It is also a well established rule that when a suitor applies to a court of chancery for relief, after any considerable length of time after the wrong complained of was committed, it is incumbent on him to show by averment * * * some sufficient excuse to justify the delay."
>
> Wetzel *v.* Minnesota Ry. Transfer Co., 65 Fed., 26.
>
> St. Paul, Stillwater & Taylor's Falls Ry Co., 49 Fed., 319, 322.
>
> Rhino *v.* Emery, 65 Fed., 835-6.
>
> Murray *v.* Chicago & N. W. Ry. Co., 92 Fed., 872.
>
> School Dist. *v.* Deweese, 93 Fed., 602.

> "A party in such case must state in his bill * * * 'the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been made before.' "
>
> Melms *v.* Pabst Brewing Co., 66 N. W., 524.
>
> Sterns *v.* Page, 7 How., 819, 829.
>
> Badger *v.* Badger, 2 Wall., 87, 95.

In Eiffert *v.* Craps, 58 Fed., 470, the court says, on pages 472 and 473:

> "The salutary rule of courts of equity for discouraging antiquated demands requires that the bill shall set forth why the complainant has remained so long ignorant of his rights, and *if his averments show that he could have learned his rights at any time, if he had chosen to inquire, or to examine a public record, his bill is to be dismissed.* Badger *v.* Badger, 2 Wall., 95; Marsh *v.* Whitmore, 21 Wall., 185; Brown *v.* County of Buena Vista, 95 U. S., 157; Naddo *v.* Bardon, 51 Ind., 493; Sterns *v.* Page, 7 How., 829."

Considering how easily all the facts alleged in the bill could have been discovered at any time since October, 1893, when complainant was in San Francisco, it cannot be said that ordinary diligence has been exercised; and considering that Judge Williams is dead, that a decree of final distribution was made in January, 1897, and that the distributees have been in the actual possession, under color and claim of title, ever since, and that complainant has stated no fact sufficient to relieve him of the imputation of laches—the bill must be dismissed for that reason.

COMPLAINANT'S AUTHORITIES DO NOT SUPPORT HIS THEORY; THEY ARE INAPPLICABLE BECAUSE DISTINGUISHABLE.

It is of course the law that every case must be founded upon a theory under which the complainant is entitled to recover, and must be based upon a bill which is good under that theory.

In Buena Vista F. S. Co. *v.* Tuohy, 107 Cal., 243, Searls, C., said (254):

> "Every complaint in an action should be founded upon a theory under which the plaintiff is entitled to recover, and should state all the facts essential to support such theory.
>
> "Failing in these respects it is radically defective,

and does not state facts sufficient to constitute a cause of action."

In Ætna Powder Co. *v.* Hildebrand, 37 N. E., 136 (137 Ind., 462, 473), the court says (pp. 139-140):

> "It is a familiar and well established rule that a pleading must proceed upon some single theory, and it must be good on that theory, or it will be held insufficient on demurrer" (citing cases).

In Gretner *v.* Fehrenschield, 68 Pac., 619 (64 Kans., 764, 766), the court said (pp. 619-620):

> "A plaintiff must frame his pleadings upon a distinct theory, and cannot, against the objection of the defendant, obtain relief upon a theory essentially different from the one alleged. In Telegraph Co. *v.* Reed, 96 Ind., 195, it was said that: 'In order to bring the parties to an issue, it is necessary to require them to make their pleadings conform to some definite theory and to be sufficient under that theory.' If the petition is not drawn upon a single and definite theory, or there is such confusion of theories alleged that the court cannot determine from the general scope of the petition upon which of several theories a recovery is sought, it is insufficient."
>
> Telegraph Co. *v.* Reed, 96 Ind., 195.

Recalling the oral argument, it appears that the plaintiff claims upon two distinct and repugnant theories:

One that the decree of distribution is final and may stand, but, having been obtained by fraud, the distributees should be charged as trustees for the equitable owner; and the other that the decree is void upon its face for non-compliance with section 1638, Code Civ. Pro., in that, so it is urged, the decree does not show that proof was made to the satisfaction of the court that notice of the hearing was given as required by the statute.

The first theory is that Thomas H. Williams died intestate as to all of the property embraced within the pro-

visions of subd. 4 of his will; that the defendants and their privies procured such property to be distributed to them by fraud, and therefore that the defendants are involuntary trustees of the portion of the estate claimed by complainant, because of the resulting trust flowing from their acts *malaficio.*

This theory, deducible from the bill of complaint, is insufficient to warrant any relief to complainant because it is not supported by allegations of fact which show either fraud on the part of the persons charged therewith, or any diligence to discover such fraud, or pursue his claim, or that complainant did not have full notice and opportunity to contest the validity of the will of deceased, and to determine any and every question relating to the ownership and distribution of said estate during the administration thereof in the probate court.

It seems needless to argue that under the second theory the bill cannot be good for manifest reasons:

If the decree is void there is no decree. If there is no decree the administration of the estate is incomplete, it stands where the petition for final distribution found it—pending in and under the control of the probate court. Whatever may be done, must be done there. This court has no supervisory power over the State court. That court, under the constitution and laws of the State, and the rules of general jurisprudence, has exclusive jurisdiction over the estates of deceased persons.

State *v.* McGlynn, 20 Cal., 274.

Again, if there is no decree, the questions of fraud are immaterial; the estate being *sub judice* before the probate court, the claims of defendant are still open to investigation there when the will shall be examined and its validity determined under appropriate proceedings to that end. Certainly neither this court nor any court of equity has any capacity to judge of the validity of wills, determine bene-

ficiaries, distribute estates, or exercise any probate jurisdiction whatever.

Broderick's Will, 21 Wall., 503.
O'Callaghan *v.* O'Brien, 199 U. S., 89.

A judgment which is void on the face of the record is not validated by the lapse of time, and may therefore be vacated and set aside, or its enforcement may be perpetually stayed by the court which rendered it on mere motion for that purpose, or that court may, on its own motion, afford the same relief as it would grant on the motion of a party, without notice to the adverse party.

People *v.* Davis, 143 Cal., 673, 675, 676.
Kreiss *v.* Hotaling, 96 Cal., 617, 622, 623, and authorities there cited.
People *v.* Greene, 74 Cal., 400, 405.

Hence, therefore, if the judgment is void on its face it may be vacated, or its enforcement perpetually stayed on motion if the latter relief be proper. An equity court has no jurisdiction to stay the enforcement of such a judgment or to do the useless act of declaring that void which the law says has been void from the beginning and will forever remain so. The principle involved is that where relief may be had by motion equity will not assume jurisdiction.

Gates *v.* Lane, 49 Cal., 626.
Chipman *v.* Bowman, 14 Cal., 158.
Imlay *v.* Carpenter, 14 Cal., 173.
Green *v.* Thomas, 17 Cal., 86.
Mays *v.* Bryte, 47 Cal., 626.
Logan *v.* Hillegas, 16 Cal., 200, 202.
Comstock *v.* Clements, 19 Cal., 77, 80.
Sanches *v.* Carriaga, 31 Cal., 170, 172, 173.

The controlling principles are shown by Ketchum *v.* Crippen, 37 Cal., 223, 227, 228; Bibend *v.* Kreutz, 20 Cal., 109, 114, 115; Ede *v.* Hazen, 61 Cal., 360, 361.

Even where a party, by laches, may have lost his remedy by motion, that circumstance affords no reason for resort to equity (Heller *v.* Dyerville Mfg. Co., 116 Cal., 127, 135, 136).

It is past doubt that if by any chance this court should conclude that the decree attacked is void, its jurisdiction to proceed further immediately ends.

It is undoubtedly the rule, too firmly established to be disregarded, that a court of chancery is not allowed to judge of the validity of a will, except as shown by the decree of probate. This is the notable exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud.

Langdon *v.* Blackburn, 109 Cal., 26.
Story's Equity Jurisprudence, sec. 440.
McDaniel *v.* Pattison, 98 Cal., 86.
Fealey *v.* Fealey, 104 Cal., 354.

We will therefore proceed with our criticism of complainant's authorities upon the question of fraud, keeping in mind that the fraud

> "must be a fraud extrinsic or collateral to the questions examined and determined in the action," * * * "that it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony;" that "the reason for this rule is, that there must be an end to litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing it in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission"
>
> Langdon *v.* Blackburn, 109 Cal., 26

and conceding, without admitting, as was said in the case last cited, that the rule as to extrinsic or collateral frauds applies to decrees of probate courts, and first, do the authorities cited sufficiently support the allegations of the bill to bring this case within the rule.

A.

As to Fraud.

An examination of the cases cited by complainant in the lower court under this head will disclose the fact that they are distinguishable from the suit under review for some one or more of the following reasons:

If the fraud committed was in obtaining the judgment complained of, it was extrinsic to the case before the court—it was neither the question actually tried, or so in issue that it was there necessarily triable. Generally they refer to acts of express trustees, fiduciary agents, and the like, dealing with the property of *cestuis que trust,* or principals, for their own benefit; keeping the defrauded party away from court by some affirmative act; selling out a client, or the like. Herein, no well considered case can be found which does not adhere to the doctrine that if the fraud was directly in the matter adjudicated—on which the judgment was rendered, the question is forever foreclosed, save in the same case or upon direct appeal; that it can never be reagitated collaterally. This is a fixed rule of law, established under the theory that a party, who has either tried or had an opportunity of trying a matter, is estopped to set up fraud "because the judgment is the highest evidence, and cannot be contradicted."

If the fraud committed was in vesting the court with jurisdiction, the case will be found to be *in personam,* and relate to a failure to comply with the rules concerning constructive service in cases *inter partes*; generally such cases

are where the jurisdiction of the court was imposed upon without service of process, or by defective service, or false affidavits of service, or the like; or where by collusion, conspiracy or consent, third parties were fraudulently deprived of their property; or where the fraud consists of something of which the complaining party could not have availed himself in the court giving the judgment, such as appears in the case of Silva *v.* Santos, 138 Cal., 536.

If the fraud committed was in obtaining an unconscionable advantage, the case will be found to be one where contractual relations of some sort existed, as for example, where a seller of goods instead of resting content with the doctrine of *caveat emptor,* assumes the risks of *caveat vendor* by either express or implied warranty. These are cases where one bargaining party, pending negotiations, obtains an advantage by gratuitous, false or fraudulent misrepresentation.

Or the case may be one where the relation of trustee and beneficiary of an express trust exists, and the trustee deals with the property of the estate for his own purposes.

The rules governing such cases have no application to probate proceedings, or other proceedings *in rem,* where the claimant was not prevented from ascertaining and asserting his rights.

Arrowsmith *v.* Gleason, 129 U. S., 86, was a case where, by collusion with the purchaser, complainant's guardian sold lands of the estate for his own private gain and for an inadequate price. This was a case of a fiduciary agent—a trustee, imposing on the court false statements, concealing the truth that he was the real purchaser, etc., and defrauding his *cestui que trust* for his own gain. This case is not in point and was clearly distinguished in Miller *v.* Perris Irr. Dist., 85 Fed., 701, 702.

Curtis *v.* Schell, 129 Cal., 208, was a case where a widow and executor borrowed money for the support of herself and family; gave mortgages covering her interest in the estate to secure repayment, and then applied to the court for a family allowance which practically exhausted the estate, and

obtained an order therefor by concealing the facts relating to the mortgages, which the court held she was bound to state. The extrinsic fraud consisted in defrauding her creditor and concealing a fact she was bound to divulge. In short, the fraud was not in the matter on which the decree was rendered—there was no issue involving that matter.

Hanley *v.* Hanley, 114 Cal., 693-4, is squarely against the contention of complainant. There the heirs sued to vacate a decree rendered in the administration of the estate of Patrick Hanley, setting apart a homestead to the widow, on the ground that she had falsely represented that a homestead declaration had been filed on the premises while she and her husband were actually residing thereon. The court held that the decree setting apart the homestead was final unless reversed on appeal, because the fraud alleged was intrinsic, because it involved the very subject-matter of inquiry in a proceeding *in rem* where all parties were bound without personal notice.

Sohler *v.* Sohler, 135 Cal., 325-327 was a case where a mother and executrix caused, by collusion with a son by a former husband, a share of the estate to be distributed to him, by falsely alleging in the petition for distribution that the fraudulent distributee was a child of the deceased. The defrauded children were minors, were not represented at the hearing, etc.

The court held that, under the circumstances the jurisdiction of the court was imposed upon notwithstanding the province of the court was to determine heirship in the proceeding, because, *while as executrix merely* it might be said that she was a disinterested party, having no concern in the question of heirship or right of distribution—standing indifferent between the parties—yet as mother and natural guardian she was under a solemn obligation to protect the legal rights of her infant and dependent offspring, and to see that their legal claims to the estate were properly presented to the court.

To the extent of this obligation her conduct constituted extrinsic fraud.

This case is said to be an exceptional one, and is distinguished in Estate of Davis, 136 Cal., 598.

Bergin *v.* Haight, 99 Cal., 52, was a case where the attorney for an administrator employed the proceedings in probate to procure title to himself through a third person by collusion with the administrator—a passive and willing instrument of the attorney. The court held that the administrator could not have bought for himself because of his relation to the estate, and his attorney stood in no better position. That such imposition upon the court constituted extrinsic fraud. This case is distinguished in Fealey *v.* Fealey, 104 Cal., 361-2.

In Wickersham *v.* Comerford, 96 Cal., 433, the widow and administrator had separated from her husband in accordance with the terms of a written instrument, providing for a division of the property and relinquishing all her rights. She applied and obtained an order setting apart to her a homestead out of the property of the estate, by concealing the terms of the separation, and falsely stating that she resided upon the property. The court held that she was not a member of the family so as to be entitled to a homestead, and that her concealment of the facts misled the court, imposed upon it jurisdiction and that her duty and failure to disclose the facts constituted extrinsic fraud.

In Fealey *v.* Fealey, 104 Cal., 354, the court, on page 361, distinguished the Wickersham case, saying that the existence or non-existence of the agreement for separation was not an issue and was not even indirectly passed upon, and "this marks the important distinction" between Wickersham *v.* Comerford and the case at bar, where the court found the will valid, and that complainant was not a beneficiary.

The case was also distinguished in Hanley *v.* Hanley, 114 Cal., 694.

In Silva *v.* Santos, 138 Cal., 536, the court required a

further account of the guardian of an insane person who fraudulently concealed in his account moneys misappropriated, and falsely represented to the court that he had made advances to the estate. (This is a case of a trustee cheating his *cestui que trust* for his own gain.) There was no appeal because the fraud did not appear in the record, and a motion would not have reached the mischief because there was an appeal (page 542). The court relies on Aldrich *v.* Barton, 138 Cal., 222. Both are extreme cases.

In Aldrich *v.* Barton, 138 Cal., 220, the trustees of an estate, while the beneficiary was a resident of the Hawaiian Islands, with intent to defraud her and keep for themselves money belonging to her, presented and secured the settlement of a false account. The court found that the plaintiff was prevented from being represented at the hearing; that the court was imposed upon, and that the fraud was extrinsic. Sohler *v.* Sohler, 135 Cal., 323, is relied upon, and Sohler *v.* Sohler is distinguished in estate of Davis, 136 Cal., 598, as we have seen.

In Anderson *v.* Bank of Lassen County, 140 Cal., 695, a fraudulent, collusive and consent judgment was obtained by the defendant for an amount largely in excess of what it was. The court held that the jurisdiction of the court had been imposed upon and that the fraud was practiced in the very act of obtaining the judgment.

In People *v.* Perris Irrigation District, 142 Cal., 606, the fraud charged was that no notice was given of the time and place of hearing a petition to confirm the organization of an irrigation district; that the court was fraudulently induced to believe it had jurisdiction and to give judgment by means of a false affidavit which stated that notice had been given as required by law. Also that the attorney employed to defend and contest the petition had been bribed to absent himself from the hearing. Clearly the fraud was extrinsic.

Dunlap *v.* Steere, 92 Cal., 346, was a case *in personam*,

and is distinguished in Mulcahey *v.* Dow, 131 Cal., 77, where the court says that the case was *in personam,* and

> "that the rule there declared ever applied to a proceeding *in rem* we gravely doubt. A proceeding to secure a decree of distribution is essentially a proceeding in the nature of one *in rem.* It has none of the characteristics of a proceeding *in personam,* as was the case of Dunlap *v.* Steere, *supra.*"

Irvine *v.* Leyh, 102 Mo., 200, is not in point, and is not the law of this state. Personal notice is not required in proceedings *in rem,* nor, in this state, is such notice required in probate proceedings. That the court acquired complete jurisdiction in this case through the statutory notice, is firmly established by

Daley *v.* Perrine, 86 Cal., 554.
Mulcahey *v.* Dow, 131 Cal., 77.
William Hill Co. *v.* Lawler, 116 Cal., 359.
Hanley *v.* Hanley, 114 Cal., 694.
Kearney *v.* Kearney, 72 Cal., 593-595.
Estate of Davis, 136 Cal., 595-6.
Langdon *v.* Blackburn, 109 Cal., 19.
In re Griffith, 84 Cal., 107, 109.

United States *v.* Throckmorton, 98 U. S., 61, 65, is a case upon which we rely, and in no sense supports the contention of complainant. In the case at bar there was certainly no false offer of compromise to complainant. He did have knowledge of the administration of the estate. He was presumed to know what proceedings might be taken under the statute. He was not kept in ignorance by any act of the defendants. No attorney sold out his interest. He was not prevented from making any application for his alleged share of the estate, or from fully exhibiting his contentions in relation to the validity of the will.

In the Throckmorton case, *supra,* after referring to nu-

merous precedents, and quoting from a Massachusetts case as follows:

> "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. *But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible.* The party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted."

the court proceeds:

> "We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the same court, and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying every case in which the judgment or decree was rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be far greater, by reason of the endless nature of the strife, than any compensation arising from doing justice to individual cases."

Counsel also, in the lower court, cited on this question of fraud, the following:

1 Freeman Judgments, sec. 492, which states the general rules governing fraudulent judgments, but does not militate against any position assumed by us. The same may be said of

1 Black Judgments, par. 290 *et seq.* 368, 370, where the rules are correctly stated to be that if the party who alleges fraud in the original judgment or decree has already been heard or *had an opportunity to be heard* in that proceeding,

he is concluded and cannot retry it in a collateral proceeding (Otterson *v.* Middleton, 102 Pa. St., 78).

The rule stated in sec. 390, that equity will relieve when a right to appear and prosecute his claims before a competent tribunal is prevented by the fraud or circumvention of one of the parties *without the fault or negligence of the other,* is not applicable to the facts stated in the bill. Here there was no trick, no circumvention—nothing done to prevent complainant from appearing in any proceeding during administration, or from seeking the interest he now asserts by his own affirmative petition, either during administration or before expiration of the appeal period, and he was guilty of the grossest negligence in not doing so.

Lataillard *v.* Orena, 91 Cal., 565, was the case of a guardian cheating his ward—the malversation of an express trustee where the grievance complained of was that the defendant knowingly received moneys in trust for plaintiff, and appropriated them to his own use, and all the time fraudulently concealed such fact from the plaintiff. In that case there was nothing to inform the plaintiff of his rights or put him on inquiry. The doctrine of laches is aptly stated and the case was correctly decided, but it does not apply here.

In Baker *v.* O'Riordan, 65 Cal., 368, a decree of distribution was made without *any notice* given, as required by law; the plaintiff was absent at sea for many years; did not know of the death of decedent, or of any of the proceedings in the probate, and had no opportunity of knowing. An attorney, without being in any way authorized and without plaintiff's knowledge, *assumed* to act for him. The court found fraud and set aside the decree of distribution. Obviously the facts of that case are utterly unlike those presented here, and the case is not authority.

Cal. Beet Sugar Co. *v.* Porter, 68 Cal., 369, was the case of a pending suit which was compromised and a stipulation made to dismiss it. Notwithstanding the settlement and

stipulation and the defendant's reliance upon both, the plaintiff in the action, in violation of his stipulation and without notice, took judgment. Under this state of facts, and in the absence of imputable laches, it was held that equity could afford relief.

How can such a case be regarded as in point here?

In Hayden *v.* Hayden, 46 Cal., 332, there was extrinsic fraud, collusion, absence of jurisdiction in the court which rendered the judgment complained of, ignorance of the facts on the part of complainant and no opportunity to learn of the frauds. Laches was not imputable. The case does not fit.

Hanscom *v.* Doullard, 79 Cal., 234, is strangely out of place. It was a case for damages for a fraudulent sale, brought about by the trick and misrepresentations of the seller.

Parsons *v.* Weis, 144 Cal., 410, was a case *inter partes,* where the defendant had taken advantage of plaintiff's absence from the State, and without his knowledge or means of knowledge, brought a fraudulent suit to quiet title, knowing the averments in his complaint to be false. He imposed upon the court a false affidavit of plaintiff's residence and procured the summons to be directed to a place where plaintiff never resided, and thus procured judgment by default. No laches was attributable to the plaintiff. It was held that the case was cognizable in a court of equity for extrinsic fraud upon the court in knowingly presenting a false complaint, without knowledge of the adverse party, and invoking the exercise of a jurisdiction never properly acquired, by a willfully false affidavit upon which constructive service depended.

B.

As to Laches.

It is conceded, of course, that the defense of laches will not be permitted when the aggrieved party was in ignorance

of the material facts connected with the transaction complained of, and that there is no statute of limitation which will run against an express trust, and that no lapse of time or delay in bringing the suit will defeat the remedy—provided the injured party was, during all of the interval, ignorant of the fraud, and of any facts sufficient to put a person of ordinary prudence upon inquiry. For what information could have been obtained by inquiry will be presumed to have been actually obtained. Mason *v.* Odum, 71 N. E., 386, 387, 388.

In the case at bar it seems too clear to require elaboration that if the complainant was ignorant of anything relating to the will of General Williams or the administration of his estate, his ignorance is fairly and necessarily ascribed, not alone to inattention, but to his wife's and to his own positive, affirmative, gross carelessness—to inexcusable negligence. Admitting negligence is a relative term, that where it is invoked each case must be considered in the light of its own circumstances—then what reason, nay, what excuse, however flimsy, appears upon the bill for this complainant's unconscionable delay?

Here is no case of a faithless trustee plundering the estate of his *cestui que trust;* no agent converting the property of his principal to his own fraudulent purposes; no violated compromise or broken pledges; no trick to lull into a sense of security; no artifice to induce non-action. The complainant has been in a position and free to act ever since he was in California in October, 1893. He knew the law; that the statute controls the administration of estates; that courts construe wills, not executors. Everything done has been openly done; there was no indecent or untoward haste; every act was recorded, and every record was spread open for his inspection. This was a proceeding *in rem, sui generis,* and absolutely controlled by statutory rules, every one of which he knew, at least by presumption. He knew of General Williams' death, and of the probate proceedings.

The only excuse attempted to be offered is that he lived in New York.

> *"If this excuse could prevail, it would unsettle all proceedings in rem."*

In re Broderick's Will, 21 Wall., 518-519, which counsel in the lower court characterized as "a hard case," but which has always been and must always be the law, as will clearly appear by

Manning *v.* San Jacinto Tin Co., 9 Fed., 737-8.
Townsend *v.* Eichelberger, 38 N. E., 207, 208.
DeMares *v.* Gilpin, 24 Pac., 568, 592.
Merchants' Nat. Bank *v.* Spates, 23 S. E., 683, 685.
Naddo *v.* Barden, 47 Fed., 787.
Rudland *v.* Mastic, 77 Fed., 688, 690.
Robbins *v.* Hope, 57 Cal., 495.
Curtis *v.* Schell, 129 Cal., 213.
O'Callaghan *v.* O'Brien, 199 U. S., 89.

This disposes of most of the cases referred to by complainant. They are not in the least opposed to our contention when referred to circumstances prevailing here.

The case of McIntire *v.* Pryor, 173 U. S., 38, was one where an ignorant colored woman was wheedled out of her property by the audacious frauds of her own agent (see 19 Sup. Ct., 358, 360).

The cases cited in support of McIntire *v.* Pryor were all cases of frauds of agents practised upon their principals; for example the case of Michoud *v.* Gerod, 4 How., 503, was a case where executors purchased their testator's estate, and so they will all be found to be within the rule which prohibits a trustee from dealing with the property of his beneficiary for his own benefit.

This is not a case where a litigant, by his act or agreement, causes his adversary to relax the vigilance which otherwise he would have exercised, but one which falls within the rule which requires the exercise of prudence and common sense

on the part of persons in their business transactions, and does not relieve one who blindly closes his eyes to the facts.

This is not the case of a man who has made all the use of his own faculties and opportunities called for by the particular occasion. The facts here were not peculiarly within Judge Williams' knowledge, or the knowledge of the distributees, but equally within the knowledge and means of knowledge of the complainant.

C.

As to Complainant's Right to Rely Upon Statement of Judge Williams.

Counsel for complainant assert that complainant had a right to rely on the representations of George E. Williams made to complainant in 1893, and cite in support of their position

Roseman *v.* Canovan, 43 Cal., 117, 118,

which was an action to recover damages for a fraudulent misrepresentation of the merchantable quality and condition of certain wool sold by the defendants to plaintiffs.

The seller knew the wool had been rained on and was badly damaged, but when the purchaser attempted to examine it and remarked on its extraordinary weight and water stains upon its enclosing sacks, he assured him that it had not been wet, but had only been slightly sprinkled with a view to light packing.

The court held that though the rule of *caveat emptor* might apply if the seller had remained silent, yet under the circumstances and on account of the active concealment and artifice of the seller, he was responsible in damages for a fraudulent misrepresentation.

It is clear that such a case involves no principle applicable to cases of this character. That was a case where, while the

seller might have remained quiet, he chose to *warrant* his goods; a case where a purchaser was prevented from making the examination by the active artifice and fraud of the seller. On page 117 the court says:

> "But possibly the plaintiffs would have ascertained its condition except for the active concealment and artifice which their evidence tends to show was practised by Canovan. Had the latter remained silent, and made no representations as to the condition of the wool; had he not undertaken to account for the weight of the sacks and the water stains upon them, and so to account for them, too, as to put to rest the expressed apprehensions of the purchaser concerning the condition of the wool, it might have been that the transaction would have fallen within the rule of *caveat emptor,* and so have involved no responsibility upon his part. For unless there be warranty or fraud the purchaser cannot be heard. * * * But these rules have no application to a case in which the vendor has resorted to a trick or artifice for the purpose of diverting the purchaser from the line of inquiry otherwise open to him."

The point in this and all such cases is that Canovan, knowing that the wool was wet and damaged, and knowing that the plaintiffs were ignorant that such was its condition, made the statements for the express and fraudulent purpose of allaying the suspicions of Roseman and inducing him to forego a further and more extended examination of the wool.

The case of Bank of Woodland *v.* Hiatt, 58 Cal., 237, was another case of false representation by a seller, in which the Supreme Court of California held that the purchaser had a right to rely upon the representations of a seller as to facts not within the purchaser's knowledge, and held further that the seller could not escape responsibility by showing that the purchaser could have ascertained that such representations were untrue. A doctrine we do not question, and not at all applicable here for the purpose of showing that Good-

rich had a right to rely upon any representations of George E. Williams.

Under the same head, Senter *v.* Senter, 70 Cal., 619, is cited. A divorce case was pending, and the parties entered into an agreement for the division of community property. There was an erroneous description of the property in the decree, by which twenty acres was omitted. An action was brought to reform the decree so as to include the twenty-acre tract, false representations having been made by one of the parties to the action that the property described included all the property which the complainant was to obtain under the agreement for a division of the community property.

It was held that they were entitled to a decree reforming the original decree. We find nothing in this case which militates against the positions we are contending for.

Henderson *v.* Henshall, 54 Fed., 320, is a case decided by the Circuit Court of Appeals of the Ninth Circuit.

In that case Mary Henshall brought an action against Charles Henderson and others to recover thirty thousand dollars damages alleged to have been sustained by her in the exchange of certain lands in California. She charged that false representations had been made by the defendants to her and her husband as to the value, character and quality of certain lands in Shasta County, which they induced the plaintiff to take for her lands in Tulare County. It was a jury trial, and a verdict for $6,000.

It appeared in that case that the defendants made a proposition concerning the exchange of the lands in Shasta County for the lands in Tulare County, and represented that the lands aggregated 560 acres of land of a value of $32 an acre; that there was a fence around 80 acres; that 160 acres had been planted in grain, and 240 acres had been cleared. Henderson proposed to exchange. Mr. Henshall suggested that it would be better to visit the land and inform himself as to the quality and condition of the property, but

Henderson told him it was not necessary, and told him he could rely upon his, Henderson's representations. Henderson made a proposition of partnership to Henshall and referred him to Holcom, representing that he was a banker of Yolo County, and not interested, and knew all about Shasta County land. Henderson then introduced Henshall to Holcom, and Holcom corroborated all that was said by Henderson to Henshall; that Henshall, relying upon the representations, believed them to be true and entered into a contract for the exchange. Henshall then wrote to Henderson suggesting that the matter be left in abeyance until he could personally inquire further into the condition and value of the land. Henderson refused the time, and said that he had sold the land and threatened litigation, and again misrepresented the character, quality and value of the land in Shasta County, and stated that it was not necessary to make an examination. The deeds were signed upon these representations, and it was alleged that the value of the land was not more than five dollars an acre, and other of the representations of Henderson were stated to be false.

It was claimed that the doctrine of *caveat emptor* should apply, and the court held that it was undoubtedly the law that a party to a contract is required to exercise reasonable care and caution to prevent being defrauded; that he must not close his eyes and be misled by over-confidence in the statements of others, but the court discriminates and says that was not the position of the plaintiff in the case, and held that the land was not near enough to afford the purchaser an opportunity for an immediate and convenient inspection; and the court held that the representations were not made with respect to matters equally within the power of both parties to ascertain, and that the purchaser did not voluntarily close her eyes to matters directly before her; that the land was at a distance; representations had been made respecting matters not within her knowledge; that she desired

to make an examination; that the vendor practically prevented it, and that the seller took her at a disadvantage. And regarding the false representations and in discriminating as against opinions of value, the court says that the number of acres cleared and under cultivation and enclosed was falsely represented, and that these were not matters of opinion, but matters of fact, and also that the statement that there was a mortgage of $3,000 on the property which was stated for the purpose of showing value, was not the giving of an opinion, but was the misrepresentation of a fact, as the only mortgage upon the place was one for $700, and the court applies the determination by the Supreme Court of the United States when they said: We think we may safely lay down the principle that whenever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which the purchaser buys upon the representations of the seller, relying upon its truth, that then the representation in effect amounts to a *warranty;* at least that the seller is bound to make good the representation.

Of course the Henderson-Henshall case was correctly decided, but it is obvious that the principles controlling that case have no place in the consideration of the one now before the court.

To cite that case and contend that it invokes a rule which should be applied here, is practically to assert that Judge Morrow radically changed his views upon the subject when he wrote the opinion in McMonagle *v.* McGlinn, 85 Fed., 88, some five years later. The fact is that both are sound, well-considered, rightly-decided cases; only, we respectfully submit, the first case is like the others cited by counsel under this head—it has no application, while the second case is not only in point, but conclusively demonstrates that this case is barred by limitations and by laches.

D.

As to Judge Williams' Statement Being One of Fact.

When the statement made by Judge Williams is considered in connection with the subject-matter there is no difficulty in finding that it was a mere expression of opinion, and so our adversaries substantially admit when they confess that he probably thought the will was valid when he informed complainant in October, 1893, that his wife had no interest in the estate. Of course, as we have frequently said, whether Mrs. Goodrich had an interest depended upon the will. The complainant knew that, because he knew that General Williams was her father; that he died leaving an estate here, and a will of which Judge Williams was the executor, and that, if by that will his wife was a beneficiary, she had an estate. He knew then, was bound to know, that when Judge Williams said his wife had no estate, he spoke by the will, he was construing its terms. He also knew, was bound to know, that the duty of construing a will is imposed upon the court. If an executor

> "undertakes to construe the provisions of a will * * * he does so at his peril."
> Estate of Willey, 140 Cal., 238, 241.

Complainant was not prevented from construing the will himself, or employing an attorney to do so. It was before him, readily accessible, as was everything else in or relating to the estate. He had no legal right to rely upon Judge Williams. There were no confidential relations between them. Nothing was suppressed—nothing concealed. The fact is, he went for Judge Williams' opinion. We think it was sound, he thinks it was unsound. In any event it was an opinion, based upon a document spread before him.

Section 1572, Civil Code, is, like many of its fellow citations in this behalf, utterly irrelevant to a case of this kind. It defines *actual* fraud committed by a party to a *contract.*

It fits the Henderson-Henshall-Roseman-Canovan sort of cases, but has no application to the facts here because no contractual relations existed.

14 Am. & Eng. Ency. of Law contains general statements of the law which are covered by what we have said, and do not militate against any position we have assumed.

Campbell *v.* Hillman, 61 Am. Decs., 195, has been elsewhere reviewed in this brief. We stand by its doctrine.

19 Am. & Eng. Ency. of Law, 255, note 7,

relies upon

Thompkins *v.* Hollister, 60 Mich., 47,

and that case was concerning the frauds committed by a trustee upon his *cestui que trust*. A case where one having the *right* to rely did rely upon statements which the trustee knew and the beneficiary did not know, were untrue.

The case of Wheeler *v.* Smith, 9 How., 55, was upon a bill filed by the complainant under the following circumstances: He was the nephew and next of kin of the testator, whose will made R. I. Taylor one of the executors and trustees, providing—

> "If any difficulty occurs in construction as to any of my bequests, R. I. Taylor is specially charged to give said construction."

Taylor was a distinguished lawyer, a man of high standing, of unimpeachable character, of commanding intellect, in whom the complainant reposed the greatest confidence, and one whom the testator had authorized to construe the provisions of the will. Complainant was young, needy, unacquainted with business, easily misled. He threatened to contest the will, whereupon Taylor assured him that he had sundry written opinions in favor of its legal validity; that there was but one opinion among the lawyers consulted, and that they were unanimous in favor of its validity. Complainant then asked Taylor for his views, and he stated that the will was good, but, to avoid the delay of a lawsuit, they

would pay for a release of complainant's claims. Complainant was given one-half a day to decide; he was in a place where public sentiment was interested to sustain the will; its construction included the solution of difficult trust provisions; he had neither time nor opportunity for examination or to get an advised opinion on the questions involved, and had to decide without the aid of counsel; he was entirely in the dark; was nervous, necessitous and greatly hurried, and under this duress of circumstances compromised and released his claims for $25,000.00. It was a purchase-and-sale transaction, in which the seller was overreached. The court held that in making the compromise the parties did not stand on equal ground; that the influences operating on the mind of the complainant induced him to sacrifice his interests, and set aside the compromise.

This case falls far short of marching up to the requirements here. It rests upon different principles. There, the complainant was allowed neither time nor opportunity to secure counsel or determine for himself the validity of the will: Here, the complainant had years for that purpose. There, in short, duress of circumstances—unequal opportunities gave the defendants an unconscionable advantage. It was a case of bargain, of contractual relations, where the seller was induced by overpowering influences to sacrifie his interest. Nothing of the sort existed here.

E.

As to Judge Williams Occupying a Fiduciary Relation.

Counsel for appellants may claim that George E. Williams stood in a fiduciary relation to the complainant.

The first principle invoked by counsel to sustain their contention to that effect in the court below was taken from the *brief* of appellant in the case of

Colton *v.* Stanford, 82 Cal., 356,

which was *affirmed*.

The statement is:

> "The law of fiduciary relation is applicable to all persons who, being employed in or concerning the affairs of another, have acquired a knowledge of his property."

There it was contended that the relation existing between Colton, deceased, Stanford, Huntington and Crocker, was that of partners and therefore subject to the ordinary rules governing trust relations; that the surviving partners, trustees, obtained an unfair advantage in dealing with the personal representative of the deceased beneficiary. The court conceded, without deciding, that the trust relation between business associates continues after the death of one of them so as to impose an active obligation upon the survivors as trustees of his estate to disclose fully and correctly the condition of the business upon a settlement with his personal representative; but held that if the latter had full access to all sources of information and investigation, and did not fully investigate; that is, if every fact which was subsequently discovered could have been discovered through the means of knowledge available—the doctrine of fiduciary relationship is not applicable.

So far as the case discusses principles having place in the consideration of the bill at bar, it counts for us, but it is not in point here. Neither complainant nor his intestate was associated with General Williams in business; neither General nor Judge Williams was ever employed in or concerning the affairs of complainant or complainant's intestate. Judge Williams' knowledge was concerning the properties of the *estate,* not the property of complainant. His duty was to administer *that* estate under the will, which was at once his guide and counselor—the source and limitation of his power. To have stated the rights of beneficiaries as facts, as contra-distinguished from construction—from opinion, was beyond his power. This complainant knew. Just here we may say that Judge Williams' conduct throughout, as shown by the

will, demonstrates that, to him at least, the will was not vulnerable to the attack here made, but was valid. If the Walkerly case had brought the Williams will within the prohibitions of the statute, in his judgment, or any construction of its provisions had satisfied him that it was invalid—he would from that time have counted himself *functus officio*. The fact that he continued to act as executor until distribution on January 5, 1897, and to act as trustee until December 17, 1899, is proof of the most convincing character that he never thought the will void.

In re Williams, 92 Cal., 183, holds and only holds that as devisee of the estate in trust, Judge Williams was empowered to sell property without confirmation, but, in heaven's name! how can that decision be tortured into the semblance of authority for contending that a trustee of an estate in probate becomes a trustee for a claimant who bases his right upon the assumption that he was never a trustee because the instrument creating the office is void? What relation of personal confidence toward complainant did Judge Williams ever assume? Over what property or what affairs of complainant did Judge Williams, by any confidence of complainant, ever obtain any control?

These considerations dispose of sec. 2219, C. C., and of every authority heretofore cited by counsel under this head. They are not in point.

Conclusion.

It is idle to proceed further. No case has been made by the bill. It does not aver, and cannot be amended to show, substantive facts justifying the interposition of a court of equity.

No case can be made for the following reasons, which, we submit, appear upon the face of the bill:

1. The Superior Court of California acquired complete jurisdiction to administer and distribute the estate.

2. Its decree of final distribution adjudicated the validity of the will, and the rights of devisees, legatees, and all possible claimants, and became final and conclusive upon the expiration of the time limited for appeal. The will is merged in the decree; all rights to the estate are measured by its terms.

3. No extrinsic fraud is alleged. No fraud existed.

4. By the constitution and statutes of California, its courts are vested with original, and supplied with machinery to exercise exclusive, jurisdiction over all matters of probate. The laws of that State do not give to *its* residents the right to assail any matter of probate in a suit in equity *inter partes*, and the circuit court, notwithstanding the diversity of citizenship, was without jurisdiction in this case. The 14th Amendment is not involved.

5. The complainant is barred by the statute of limitations.

6. Equity cannot grant relief because of inexcusable laches.

7. The will is valid.

That the judgment of the circuit court in sustaining the demurrers and dismissing the bill should be affirmed follows as matter of course.

J. W. DORSEY,
Counsel for Appellees Frank S. Johnson and Frank H. Johnson.

HENRY ACH,
Counsel for All Other Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 120.

GEORGE W. GOODRICH, APPELLANT,

vs.

JOHN W. FERRIS, FRANK HANSFORD JOHNSON, AN INFANT; FRANK S. JOHNSON, GUARDIAN OF THE ESTATE OF FRANK HANSFORD JOHNSON; THOMAS H. WILLIAMS, JR., THOMAS H. WILLIAMS, SECOND, AN INFANT; GEORGIE E. WILLIAMS, AND JENNIE E. WILLIAMS.

Supplemental Brief for the Appellees.

HENRY E. DAVIS,
For the Appellees.

J. W. DORSEY,
Of Counsel.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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Supplemental Brief for the Appellees.

ABSTRACT OF THE BILL.*

Allegations.

1. Complainant, citizen of New York, sues defendants, citizens of California.

2. February 20, 1886, Thomas H. Williams, of California, died there, possessed of real property, described in decree of distribution, Exhibit C, and leaving no wife, but the following children, his heirs at law: Sherrod,

*As set forth, with its amendments, on pages 81 to 118 of the brief for the appellant.

Thomas H., Jr., Mary Bryant (intermarried with Frank S. Johnson), Percy, and Bryant; and, upon his death,

> " that part of his real estate situated in the State of California, of which he died intestate, as hereinafter set forth, passed to and vested one-fifth in each of his children."

3. Sherrod died August 2, 1888, leaving no wife or issue, and leaving his sister and brothers—

> "who, under the laws of California . . . became and were his only heirs at law, and his real estate situated in the State of California passed to and vested, one-fourth thereof, in said"

sister and brothers.

4. Percy, on August 1, 1888, married one Bessie, and had one child, born November 12, 1899, who died February 16, 1890. Percy died October 3, 1890, leaving a will bequeathing all his property to his widow, and appointing Thomas H., Jr., executor. Thomas H., Jr., is still such executor, and has acquired all the interest of Bessie in the estate of Percy, which comprises all the interest of the latter in the estate of the testator.

5. Bryant died May 3, 1893, unmarried and without issue, leaving his sister Mary, and his brother Thomas H., Jr.—

> "who, under the laws of California . . . became and were his only heirs at law, and his real estate situated in the State of California passed to and vested, one-half thereof, in said"

sister and brother, each.

6. Prior to the death of the testator, Mary married Johnson and had one son, Frank. In the Superior Court of the County of Marin, California, by decree of December 29, 1888, Johnson, at his suit, was divorced from Mary, and, on December 7, 1889, at the City of New

York, Mary married complainant. She died at New York October 3, 1893, leaving the complainant—

> "her husband, and her son, Frank, . . . who, under the laws of California . . . became and were her only heirs at law, and her real estate situated in the State of California passed to and vested, one-half thereof"

in complainant and her said son.

7. In June, 1901, Thomas H., Jr., married Beatrice Steele, and they have living a son, known as Thomas H., 2nd, born February 14, 1903—

> "and who, under the will and decree of distribution hereafter fully set forth, claims to have an estate or interest in said real property in the State of California, or some part thereof."

8. Jennie R. Williams is the surviving wife of George E. Williams, deceased, and Georgie E. Williams is the only issue of said George E. Williams, deceased; and Jennie and Georgie E.—

> "are the only heirs at law of the said George E. Williams, deceased, and under said will and decree of distribution hereafter fully set forth they claim to have an interest or estate in the said real property situated in the State of California, or some part thereof."

9. Prior to his death, the testator made two papers purporting to be his last will and codicil thereto, copies of which, marked Exhibit A and Exhibit B, are annexed to the bill.

10. Under the laws of California, the trust attempted to be created by the will was, and is, void; the absolute power of alienation included in said attempted trust was suspended for a period not measured by the continuance of lives in being; and as to the property included in said attempted trust, the testator—

> "died intestate, and . . . at his death the said property passed to and vested in his said heirs at law in the proportions before mentioned."

In the Superior Court of the county of San Francisco, such proceedings were had that the court, by order of April 6, 1886, admitted the will and codicil to probate and directed that letters testamentary be granted unto George E. Williams, executor and trustee therein named, who qualified as such executor and took possession of the estate of the testator included in said void trust—

> "as such executor, and as testamentary trustee under said will, and entered upon the execution of said void trust . . . until the 5th day of January, 1897, when the said consent decree of distribution, hereinafter fully set forth, was made."

12. Frank S. Johnson (formerly husband of Mary), on March 11, 1889, was appointed by the Superior Court of Marin County guardian of his son, Frank; on the same day he qualified as such guardian; and ever since he has been, and now is, guardian of the estate of his said son.

13. On August 1, 1896, the said Frank (son of Mary), applied, by petition, to the Superior Court of Marin County for leave to consent to a decree of distribution of the estate of the testator, the terms and provisions of which had previously been agreed upon between Thomas H., Jr., Frank (through his guardian, Frank S.), and George E. Williams, testamentary trustee, and also for leave to consent to the appointment of appraisers—

> "to appraise said estate of said decedent pursuant to the terms and provisions of said void trust,"

in which petition the complainant's existence and other facts were fraudulently concealed from the court. Frank (through his guardian), with intent to deceive the court, led it to believe that the only persons interested in the estate were Frank, Thomas H., Jr., and the testamentary trustee, George E. Williams; at the time of making said application for leave to consent, as aforesaid, Frank

(through his guardian) knew that the trust was void at its creation, and that the consent decree of distribution, to which leave to consent was asked, would work great injury to his share of the property embraced in the void trust; and Frank (through his guardian) knew that there were questions of law and fact, which, in good conscience, should have been submitted to, and determined by, the court before he, Frank, should be permitted to consent that any distribution, or other disposition, of said trust property should be made; and before said petition to said court had been filed, an agreement had been made between Thomas H., Jr., and Frank (through his guardian), and consented to by George E., that said questions of law and fact should be concealed and kept from the court, so that they might wrongfully and fraudulently obtain all of said estate of the deceased to themselves, and thereby wrongfully and fraudulently deprive the complainant of his legal share thereof. On August 1, 1896, the court of Marin County made a decree permitting Frank (through his guardian) to give such consent; and the complainant—

> "had no notice or knowledge of said proceeding or decree in said court of Marin County until November, 1903."

14. On August 7, 1896, Thomas H., Jr., filed his petition in the Superior Court of San Francisco, asking for the appointment of appraisers of said estate, pursuant to the terms of said void trust, which petition was subscribed and sworn to by Thomas H., Jr., on August 4, 1896. In said petition, the fact of the marriage of the complainant to Mary, the divorced wife of said Frank S. Johnson, was fraudulently concealed from the court, and said petition falsely and fraudulently, with intent to deceive the court, represented that George E. Williams, executor and trustee, Frank, and Thomas H., Jr., were the

only persons then living interested in the distribution of the said estate; whereas, the said petitioner, and George E. Williams, Frank, and his guardian well knew of the marriage of the complainant with Mary, and that he was, as he charges the fact to be, entitled to a distributive share of said estate—

> "whether the said trust was void, *or whether it was lawful and good.*"*

George E., Frank, and his guardian were the only persons interested who had been served with notice or were parties to the proceeding, and the complainant had no notice or knowledge thereof, and—

> "never was a party thereto, or had a day in court therein."

By consent of the parties before the court, the court made the order prayed for on August 12, 1896, and filed December 11, 1896.

15. The appraisers, pursuant to said order, appraised the property of the estate—

> "and the said real estate is worth at this time, at least, the amount of said appraisement and . . . the interest of (the complainant) therein, which forms the subject-matter of this suit or controversy, is worth more than five thousand dollars."

16. On December 16, 1896, Thomas H., Jr., filed, in said Superior Court of San Francisco, in the proceeding entitled "In the matter of the estate of Thomas H. Williams, deceased," his petition as beneficiary under the trust for final distribution, under the terms of said will, of the estate embraced in the trust; and, at the same

*It was conceded on the hearing that if the will was "lawful and good," the complainant would, in any event, have no claim to any interest in the estate.

time. George E. also presented and filed, in said proceeding, his final account and report of his administration of said estate as executor, together with a petition for the settlement of said account and the final distribution of said estate; in all which the complainant's existence, and the fact of his marriage, as aforesaid, were fraudulently, and with intent to deceive the court, concealed from the court, etc., etc., so that the complainant might wrongfully and fraudulently be deprived of his legal share of the estate.

17. In consequence of the concealments, false representations and consents, as aforesaid, the said Superior Court, in said proceeding, on January 5, 1897, rendered the consent decree of distribution, of which Exhibit C to the bill is a copy.

18. Complainant was never made a party to the said proceeding "In the matter of the estate of Thomas H. Williams, deceased," or to any proceedings in the administration of said estate in said matter; said proceedings have not been revived or continued as against him since the death of his wife, and—

> "he is not, and never has been, a party thereto, and had no notice or knowledge thereof; and . . . he had no notice or knowledge of any of the proceedings therein mentioned for the distribution of the estate, or of the action or decree of the court thereon; and . . . in said proceedings for said final decree of distribution, no day is, or was, or has been, given to (complainant), and . . . his first knowledge thereof, or of any thereof, was in November, 1903."

Before the hearing upon the petition for final distribution aforesaid, said decree of distribution had been agreed to by and between Frank (through his guardian), George E., executor and trustee under the said void trust, and Thomas H., Jr., and had been consented to by

each of them, and, by force of said decree, the whole of the real estate of the testator then remaining in the hands of George E., executor and testamentary trustee of said void trust, was wrongfully and fraudulently divided among the parties mentioned, "as provided in said will," and in accordance with said void trust.

20. Said decree was obtained by fraud, concealment, and deception upon the court, and by unlawful confederation, etc., on the part of the parties thereto; the court had no jurisdiction to distribute said estate under the terms of said void trust, as the same was void in its creation; and, as to the said trust property, the testator died intestate, and it passed to, and vested in, his heirs at law at the time of his death, and to the heirs at law of Percy, Sherrod, Bryant, and Mary, respectively, as they severally died; the concealment of the complainant's existence and interest in the estate was a fraud upon the court; the said consents were frauds upon the court; and the said fraudulent concealment and imposition upon, and false representation to, the court in obtaining said consent decree of distribution were with the intent wrongfully to defeat the complainant of his right, as heir at law, to the real estate of his deceased wife.

21. The parties to said consent decree pretended that the same was fairly and properly obtained, that the said trust was valid, that a day was given in the proceedings to obtain said decree to the complainant to show cause against the same, and that complainant is not entitled to attack the validity of said decree or the validity of said trust, or to other relief as against their fraudulent acts aforesaid, whereas complainant charges the contrary to be true: That said trust should be declared void; that said consent decree should be adjudged to be nothing more than an agreement between the consenting parties thereto for the fraudulent division among themselves of the share of the real estate belonging to the

complainant; that the alleged trust is void and was void at its creation; that, as to the property involved in said trust, the decedent died intestate, and that, under the circumstances, the defendants, Thomas H., Jr., Frank and Ferris, successor of said George E. Williams, trustee, became, and are, trustees for complainant of the share of the real estate of said decedent, to which complainant was and is entitled, as aforesaid.

22. Complainant, not being a party to, and having no notice or knowledge of, the probate proceedings in which said decree of distribution was made, could not appeal therefrom, and his only remedy to set aside said decree and obtain the relief herein prayed for is by the interposition of a court of equity, and, under the laws of California, the probate division of said Superior Court has, and had, no jurisdiction in that behalf.

23. George E. Williams, trustee, as aforesaid, died December 17, 1899, and, in an action in the Superior Court of San Francisco, such proceedings were had that, on May 21, 1900, Ferris was appointed trustee of said void trust, in the place and stead of said George E.

24. Complainant was never made a party to said last mentioned action, and had no knowledge or notice of the bringing or prosecution of said action, or the proceedings therein, or any of them, or of the action or decree of the court thereon; Thomas H., Jr., and Frank, and his guardian, parties to said action, fraudulently represented to the court that the parties therein named were the only persons interested in the estate of the testator, etc.; and complainant had no notice of said last mentioned action, or of the decree of said court therein, until November, 1903. Ferris duly qualified as trustee and took, and retains, possession of a portion of the property distributed under said consent decree, which, by its terms, was left in the hands of George E. Williams, as trustee, for the purpose of said void trust.

25. Under the laws of California, Thomas H. Williams, Jr., Frank, and Ferris, testamentary trustee, by reason of the fraudulent and wrongful acts and concealments aforesaid, and the invalidity of said void trust, as aforesaid, became, and are, trustees of the complainant of the share of the real estate described in said decree of distribution belonging to the complainant and distributed among the parties thereto by the fraudulent and consent decree of distribution under such void trust, as aforesaid.

26. Although the facts of the existence of complainant, that he was a citizen of New York, and resided in the city of New York, were well-known to Thomas H. Williams, Jr., Frank (through his guardian), and George E. Williams, and although complainant was entitled to reasonable and sufficient notice of the proceedings about to be taken by them for the distribution of the estate, they did, in order the more effectually to accomplish their said fraudulent purposes and design, and in order to obtain an apparent jurisdiction over complainant, obtain from said Superior Court of San Francisco, upon the filing of their said petition for distribution, orders fixing the 26th day of December, 1896, for the hearing of said petition, and directing that notice thereof be given by posting the same in three public places in San Francisco. Pursuant to said order, notices were posted, but said notices did not specify the true time fixed, as aforesaid, for such hearing, nor did either of them. The said posting was, by said order, directed to be made ten days before the said day fixed for the hearing of said petitions for distribution.

> "The said period of ten days was insufficient time for (complainant), who resided in New York, to have, by any possibility, obtained knowledge of such notices and to have prepared for the hearing of said proceedings for distribution, and . . . said notices and the proceedings had in pursuance

> thereof were not, and did not, constitute due process of law within the meaning of section 1, of Article XIV, of the Constitution of the United States, and (complainant) never had his day in court in said proceedings for distribution, and the same as to him were, and are, void;"

and complainant avers that, by reason of the proceedings had and taken, as aforesaid, in the matter of the distribution of said estate, complainant—

> "has been deprived of his said interest in said real property of said decedent without due process of law, within the meaning of said section 1, of said Article XIV, of the Constitution of the United States."

27. Immediately upon the making of said decree of distribution, Thomas H. Williams, Jr., Frank, and the said George E. Williams, trustee as aforesaid, severally took possession of the property set apart to them by the decree, have ever since retained, and do yet hold, possession of the property set apart to them, respectively, as aforesaid, by said decree, and have received and collected the rents, issues and profits thereof, aggregating a large amount of money; and, by reason of the taking and retention of that portion of the property to which complainant is entitled, as aforesaid, under the fraudulent acts and circumstances, as aforesaid, and by reason of the invalidity of said trust, as aforesaid, the said Thomas H. Williams, Jr., Frank, and Ferris, are now trustees for complainant of the property to which he is entitled as herein alleged, under the general principles of equity jurisprudence, and also under the law of California.

28. Sections 1633 and 1634 of the Code of Civil Procedure of San Francisco are here set forth. The account alleged to have been filed in the Superior Court of San Francisco, Probate Division, "In the matter of the estate

of Thomas H. Williams, deceased," on December 15, 1896, was an account filed for a final settlement of said estate. The petitions for distribution of said estate filed by George E. Williams, executor, and Thomas H. Williams, Jr., were filed by them, and each of them, for a final distribution of said estate, and the report filed by said executor on December 15, 1896, was filed as and for his final report of his administration of said estate; and under and by said sections, as recited, it is provided that the notice to be given of the hearing to be had on such settlement of said final account and of such petitions for final distribution must be given by posting or publication for at least ten days prior to the day of settlement.

29. Said statute further provides that, upon the final hearing at the time appointed for such settlement, the court, or the judge thereof, if the time or notice given be deemed insufficient from any cause, may order such further notice to be given as may seem to him proper, as provided in and by section 1633. Pursuant to said last mentioned section, the said Superior Court, in said proceeding, made an order directing that notice of the settlement of said final account and of the hearing on such petitions for distribution be given by the posting of notices in three public places in San Francisco, and that such posting should be made ten days before the day fixed as aforesaid for the settlement of said final account and the hearing on the petitions for final distribution. The time, as fixed by said order, was the minimum time allowed, to wit, ten days.

> "By reason of the fraudulent concealment of the existence of (complainant); and of the fact that he resided in, and was a citizen of, the State of New York; and of the fact that he was entitled to a distributive share of the estate of said Thomas H. Williams, deceased, whether the said trust were void or valid; and also by reason of the false and

fraudulent representations to the said court, made as aforesaid, . . . the said court was imposed upon and led to believe, and did believe, that there were no persons interested in said estate other than the said Thomas H. Williams, Jr., and Frank Hansford Johnson and said George E. Williams, and, by such inducements, the minimum time was fixed, as aforesaid, by said court for the giving of such notice, as aforesaid, when in fact and in truth the time as thus fixed was not a reasonable time of notice, and did not, and could not give to your orator any notice of the said proceedings, or any of them, and did not, and could not, afford him any opportunity to appear in said matter or to be heard therein; (and) upon the final hearing at the time of such settlement the defendants, Thomas H. Williams and Frank Hansford Johnson, through his said guardian, and said George E. Williams, continued such concealments and such fraudulent misrepresentations to said court, otherwise said court would have deemed the said notices insufficient, and would have awarded further and other notice to be given to your orator."

30. Complainant has not been in California at any time since the death of his wife, except for a few days immediately after her death. While in San Francisco, George E. Williams declared to complainant that his wife had no interest in the estate of her deceased father, or property of any kind or character whatever, and that she left no estate; and complainant thereupon returned to his residence in New York. When in San Francisco, complainant inquired of said George E. Williams whether his, complainant's, wife had left any property or estate available for the payment of a demand upon complainant on account of an indebtedness of his wife, and the said Williams assured complainant, and represented, stated, and declared to him, that his wife had left no property or estate whatever, and complainant believed and relied

upon the representations, declarations, and statements of said Williams, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife, and, being so induced, therefore abstained from any such inquiry—

> "and he knew nothing at all of the fact that he was entitled to any property as heir at law of his deceased wife, or under said will of Thomas H. Williams, deceased, until the month of November, 1903, when, in the city of New York, his attention was first called to said matter by a stranger, who, while in San Francisco pursuing an investigation, not at (complainant's) instance, and not concerning himself or his interest, had himself discovered the fact that (complainant) was entitled as aforesaid, whereupon (complainant) took steps at once to ascertain the facts connected with his interest in said property, as hereinbefore stated, and retained counsel to prosecute the necessary inquiries relating thereto, and also to enforce such rights as (complainant) may have in the premises."

31. In the petition of George E. Williams for distribution of the estate of said decedent, said Williams stated, among other things, that numerous controversies had existed between Thomas H., Jr., and Frank S. Johnson, guardian of Frank, and that no other persons were interested in the distribution of the estate belonging to the decedent except himself, George E. Williams, Frank, and Thomas H. Williams, Jr., and that Frank S. Johnson, guardian as aforesaid, and Thomas H. Williams, Jr., had agreed upon an amicable settlement of all disputes between them, and said Frank S. Johnson had due and legal authority to enter into and to consent to such settlement in the distribution of said estate. In the petition of Frank S. Johnson, as guardian of the estate of Frank, the said Frank S. stated, among other things, that

all the children of the decedent named in his will, excepting the said Thomas H. and Mary, had died without issue, and that Mary had died leaving one child, namely, Frank, who was the sole issue of said Mary, and the petitioner, Frank S., "who were husband and wife." Complainant alleges that said allegation was made for the purpose of inducing the court to believe, and the court was thereby induced to believe, that Frank S. Johnson was the husband of Mary at the time of her death. In the petition of said Frank S. Johnson, in behalf of Frank, and in that of Thomas H. Williams, Jr., for distribution of the estate of said decedent, were certain allegations as to controversies involving questions of law and as to the parties in interest, which allegations were made for the purpose and with the intent of inducing the court to withhold its consideration and determination of said questions of law, and to prevent the submission of the same to the court, and to avoid a consideration of the same by the court. Relying upon the allegations that Frank and Thomas H. Williams, Jr., were the only persons interested in the distribution of the estate of the said decedent, and that they had agreed respecting the distribution of the property of the said estate, the court was induced to believe, and did believe, that said persons were the only persons interested in the said estate and concerned in the distribution thereof and that their agreement was operative to settle and adjust their respective rights and differences, and to distribute said estate lawfully; and the court thereupon made the said consent decree of distribution, in so doing being imposed upon by the said allegations in the said petitions; and, relying thereon, as aforesaid, the court did not consider any of said questions of law or fact, and the same were never presented to said court, and never adjudicated upon, and none of them was ever adjudicated or determined.

32. Among the questions of law, concerning which questions controversies had arisen between the said parties, was that of the true construction of the will of said decedent; and all said parties knew that the trust attempted to be created by the will was void, and that as to his real property the decedent had died intestate, and that, if said questions were submitted to said court, the determination thereof could not be otherwise than that the said trust was void and that decedent had died intestate and complainant was entitled to a distributive share of said estate.

33. The allegations of the petition of the said Johnson, guardian, were made with intent to deceive the said court of Marin County into the belief that no person was interested in said matter other than said minor Frank, and his guardian, and, by reason thereof, to withhold notice to complainant of such petition and said agreement, and said court, accordingly, omitted to give any notice of hearing of the petition of the said guardian, but granted the same *ex parte*, upon the faith of said petition and a written consent purporting to be by all persons interested.

34. By reason of the petition aforesaid, it was made to appear to the Probate Court that all persons interested in the estate of the said decedent had consented to an agreement providing for the distribution of, and effectually to distribute finally, said estate; and that, because of such consent and agreement of all persons interested in said estate, it would not be necessary for the said court to consider or determine any of the questions of law and fact, which, as stated in said petitions, had arisen among respondents, including the question of the construction of the will of said decedent, and the validity of the trust created thereby; wherefore, upon the hearing of said petitions for distribution, the court did so believe, and was thereby induced to forbear and re-

frain from all inquiry into, and consideration of, such questions of law and fact, and, upon such hearing, no testimony was taken, none of such questions was discussed, no evidence was submitted thereon, except such petitions themselves and said agreement, no argument was had upon any of said questions, none of them was decided, and the merits of the controversies that had arisen upon such questions as stated in said petitions were not inquired into or considered at all, but, upon the representations made in said petitions, as aforesaid, and in the same representations again made at the hearing of said petitions that all such matters and things had been settled by agreement, the said Probate Court made said decree—

> "but only as a consent decree to record and carry into effect the said agreement of said George E. Williams and respondents Johnson and Thomas H. Williams, Jr., and not otherwise."

35. By reason of the representations and declarations of George E. Williams, made in 1893, to complainant, complainant was induced to believe, and did believe, until November, 1903, that his wife had received no property or estate whatever, and that her interest in the estate of her father, the said decedent, ceased with her death. George E. Williams was by profession an attorney at law, of great experience, and, for a number of years, judge of the Superior Court of San Francisco. Complainant is not a lawyer; never was; and knew nothing of the laws of California.

36. Complainant knew nothing about the will of the decedent, was not familiar with its terms, and was not aware of the nature and extent of the provisions it made for his wife. All he knew was that his wife, during their married life, was receiving money from her father's estate in California. How much she was thus receiving, and had

received, complainant did not know, and, during all their married life, they lived in New York City, where complainant has resided for twenty years last past.

37. The lands described in said decree of distribution are not of fluctuating value. They are worth no more than when respondents acquired control of them, as herein alleged. No improvements of great value or consequence have been made upon them, and respondents are now in possession of them, as herein alleged, and the rents, issues, and profits of such lands, since respondents obtained them, as aforesaid, have largely exceeded in value and amount any moneys expended for taxes, insurance, repairs, or betterments, or improvements of any kind.

Prayers.

1. For discovery, upon stated interrogatories.

2. That the decree of distribution be decreed fraudulent, and of no force and effect as against complainant.

3. That the trust attempted to be created by the will was void at its creation; that, as to the real estate embraced in said trust, the decedent died intestate, and, at his death, the same passed to, and vested in, his heirs at law; and that complainant, on the death of his wife, became entitled to seven thirty-seconds of said real estate then in the hands of the executor and trustee under the will.

4. For discovery by certain of the defendants.

5. That defendants, Thomas H. Williams Jr., Frank H. Johnson, and Ferris be decreed to be trustees for complainant of that part of the real estate of the decedent to which complainant is entitled as heir at law of his deceased wife, etc.

6. For a receiver.

7. For an account; and that, upon such accounting, it be ascertained to what portion of said real estate and of

the rents and profits thereof the complainant is entitled from said defendants, and each of them; and for conveyance to complainant of such portion, etc.

8. For general relief.

9. For process.

The Case in Fact.

In its essentials, the case made by the bill is this:

The testator died February 28, 1886. His will was admitted to probate April 2, 1886, and the executor qualified and took possession of the estate April 6, 1886.

For a period but three days short of seven years and six months after the qualification of the executor and his entry upon possession of the estate, that is, until October 3, 1893, on which day she died, complainant's wife, and his privy in estate, accepted the benefits of the will and acquiesced in its carrying out, according to its provisions; which provisions were greatly more to her advantage than had her father died intestate. By the terms of the will one of her four brothers, Sherrod, was totally disinherited; another, Bryant, was given a limited share of the estate much less than he would have received as heir; each of her two other brothers was also given a limited share, which, while greater than that given to Bryant, was yet less than either would have taken as heir; and she herself was given a larger interest than any of her brothers, and, in view of all the provisions of the will, a larger share than she would have taken by inheritance. And, in addition, had she survived her brothers, Percy and Thomas, they dying without issue, she would have received the entire estate. How greatly, therefore, it was to her interest to accept the benefits of the will, rather than to question it, is too obvious for comment.

The complainant and his wife were married December 7, 1889, nearly four years before her death, and, during

this period of nearly four years, he knew that she was receiving money from her father's estate in California. A few days after his wife's death complainant took her remains to San Francisco for interment, and, while there, in the State of California, the *situs* of the testator's estate, complainant asked the person who happened to be executor (for, be it noted, complainant does not say that he made the inquiry of that person, namely, George E. Williams, in his capacity as either executor or trustee under the will), whether his, complainant's, wife had left any property or estate available for the payment of a demand made upon complainant in respect of an indebtedness of his wife, and said Williams informed complainant that his wife had left no property or estate, that she had no interest in the estate of the testator, her father, and that her interest in the estate had died with her. Complainant made this inquiry as to his wife's estate under the exigency of the demand made upon him because of the indebtedness incurred by her, and notwithstanding that he knew that the money which she had been receiving came from her father's estate, he rested content with the answer that her interest had ceased; and that he accepted the answer as an opinion, as distinguished from the statement of a fact, is made clear by the allegations of the bill that Williams, who gave the answer, was a lawyer of many years' practice and of great experience, and was, for a number of years, a judge of one of the courts of California; whereas the complainant is a layman and knew nothing of the laws of California.

In December, 1896, more than three years after the death of complainant's wife, and his being told that her interest in her father's estate had died with her, petitions were filed for final distribution of the testator's

estate and for the settlement of the executor's final account. Full ten days' notice of the hearing of the petitions for final distribution and settlement of the account was given, according to the law of California, for the 26th day of December, 1896, and, on that day, the matter was continued, by the court, until, and including, the 5th day of January, 1897, that is to say, for another and further period of ten days; and, on said 5th day of January, 1897, the decree of final distribution of the estate was made and passed in due form, and the parties to whom such distribution was made, respectively, entered upon, and since have possessed, the several portions of, and interests in, the estate distributed to them by that decree.

For a further period of within less than one month of three years after the passage of the decree of distribution and the settlement of his account, the executor continued alive, he dying on December 17, 1899.

For a further period of within one month of four years after the death of the executor, complainant continued supine, and, at the end of that time, namely, in November, 1903, he was informed by a stranger that he, complainant, had some interest in the testator's estate; and still six months later, namely, on May 19, 1904, he filed his bill of complaint.

It thus appears that the bill was filed more than eighteen years after the admission of the will to probate and the qualification of the executor; more than ten years after the death of the complainant's wife and his inquiry in California concerning her estate; more than seven years after the passage of the decree of distribution; and more than four years and five months after the death of the person (happening to be executor and trustee under the will) by whose statement the complainant's inaction is claimed to have been induced.

Moreover, the only person who could, by any possibility, be substantially affected by complainant's obtaining the relief sought by the bill is Frank H. Johnson, who is, in effect, the one real defendant in the case. He is the son of complainant's wife by her former marriage with the nominal defendant, Frank S. Johnson, who, for her own fault, divorced her and procured the custody and guardianship of Frank when he was an infant of the tender age of three years. The interest in the testator's estate which complainant is seeking he claims under the law of California by reason of the mere fact that Frank's mother died while his, complainant's, wife; and that which he claims would be taken only from Frank, the innocent heir, by both nature and law, of his mother and his grandfather, the creator of the estate, who, in the very will in question, remembered his grandson as an object of his bounty and affection by giving him a legacy, without regard to what might, in the end, come to him through his mother (Rec., p. 21, fol. 39).

Independently of the statement alleged to have been made to complainant in California in October, or, at the latest, November, 1893, and to have induced complainant's inaction, the alleged fraud set up by the bill consists, exclusively, in the omission of complainant as a party to the proceedings leading up to, and culminating in, the decree of distribution, and of any mention of him as a possible party in interest; the allegations in those proceedings that, at the time thereof, the only parties interested in the estate were those who, in fact, were the only parties, unless complainant were one; and that there had arisen among the parties in interest certain controversies and questions of law which it was the object of the proceedings to compose and settle; it being incidentally alleged that, among these questions,

was that as to the validity of the trust feature of the will, which feature the parties to the proceedings knew to be void.

The proceedings looking to the decree of distribution were ancillary to, and in continuation of, the probate of the will, and were begun August 1, 1896, nearly three years after the death of complainant's wife, and his being told that her interest in the estate had ceased, and more than ten years from the time at which she had entered upon the enjoyment of her benefits under the will; in which enjoyment, as already stated, she had continued for a period of more than seven years up to the date of her death.

It is manifest at a glance that, if the fact were that the interest of complainant's wife in the estate ceased at her death, the allegations in the proceedings looking to the decree of distribution, which are complained of as fraudulent, were proper and in exact accord with the situation, to the making of which complainant's wife was party, and in the maintenance of which she acquiesced for upwards of seven years: namely, the situation that the will was being administered as though either there never had been any question as to its validity, or that such question, if ever existing, had disappeared, by waiver or common understanding, and that the estate was to be administered as though no such question had ever existed. On its face, therefore, the bill itself negatives the idea of any intentional fraud—that is to say, any fraud in fact, in respect of the matters alleged as fraudulent—and leaves for consideration, as respects fraud, only the question whether the allegations, made under the circumstances disclosed, could, by any possibility, be considered to involve fraud in law.

Whatever might be the result of an inquiry in that

behalf, what ought to be a controlling feature of the case is that, having acquiesced for more than ten years in the statement made to him in October or November, 1893, as to the cessation of his wife's interest in the estate (which statement the industrious averments of the bill clearly show to have been of opinion only), and having waited for a period of more than seven years after the final act in the administration of the estate (which final act was had in strict compliance with the laws of the state of *situs* of the matter in question, with which laws complainant is conclusively presumed to have been familiar, and by which, upon every principle, he is conclusively bound), complainant now asks a court of equity, in a case wholly independent of the main case (that, namely, of the administration of the estate and in which the decree complained of was made), to open and vacate the distribution, which, confessedly, was the natural and inevitable objective and result of a situation in part created by his own privy in estate; which situation, according to any hypothesis of complainant's case, never could have been made without, not merely her acquiescence, but her help.

It is scarcely necessary to suggest to the court that the foregoing consideration of the case is on the assumption of what is not conceded, but denied, namely, that the will in question, or any provision thereof, is invalid. As already indicated, it was conceded at the hearing by counsel for the appellant that complainant's claim depends entirely upon the invalidity of the trust feature of the will, and the argument hereby addressed to the court is exclusively directed against complainant's claim on the hypothesis of such invalidity. The view that the feature in question is lawful and valid is left for its support to the treatment of the subject in the main brief.

The Case in Law.

It is not the present purpose to make anew the arguments advanced in the main brief for the appellees, or again to review at any length the authorities therein cited to the propositions of law obviously suggested by the foregoing exposition of the case, as it is conceived by counsel presenting this brief; but it is deemed not amiss nor unhelpful to the court briefly to restate certain principles and adjudications with definite regard to the manner and order of the foregoing statement.

1. That a proceeding having for its object the settlement of the estate of a decedent, including the determination of the persons who, by law, are entitled thereto, and also the shares therein to which each of such persons is entitled, is so far a proceeding *in rem* as to be subject to, and governed by, the principles applicable to such a proceeding surely requires no extended consideration. Beginning with Broderick's Will, 21 Wall., 503, and down to and including the case of Farrell *vs.* O'Brien, 199 U. S., 89, the adjudications of this court speak with but one voice; and those adjudications, together with the authorities upon which they rest, and with which all the other authorities cited in the main brief are in accord, may confidently be assumed to establish as a proposition no longer open to discussion that the procedure in such a case, if in accord with the law of the jurisdiction and duly followed, so far vests the court acting with jurisdiction of the estate, and summons before the court entertaining the proceeding the entire world for the purpose in hand, as to make the result of the proceeding binding upon every person who might, by any possibility, present any claim in the premises to the court for its determination (see main brief, pp. 35–39, 90–92).

2. It is equally closed to discussion that in such a proceeding constructive notice by publication or posting, if duly given in accordance with statutory requirements, is as entirely valid and effective as though given by personal service upon any person claimed to be affected thereby, and that by giving the notice directed by the statute the court acquires jurisdiction over all persons whomsoever for the purpose of determining their rights to any portion of the estate under consideration (*Id.* 35, 6).

3. Also it is settled beyond all room for controversy that "the right of inheritance, the power of testamentary disposition, the nature and mode of the proceeding for administration, as well as the character of the evidence by which proof of the fact of disposition shall be preserved, and the right of appeal in probate matters are all within the exclusive control of the legislature. The persons who by grace of the statute are designated or constituted heirs or devisees have no ground for a claim that they are deprived of their property without due process of law merely because the same statutory law, which provides that they shall inherit and that property may be disposed of by the will [contains also provisions prescribing conditions upon which they shall inherit or dispose by will of property]; they take the estate subject to that very contingency and they are not deprived of it in the sense intended by the constitutional inhibition when that contingency occurs" (*Id.* 21).

It is no excuse against the principle thus enunciated, or that of constructive service, that a person claimed to be bound by the proceedings lived in a secluded region and did not hear of the decedent's death, or of the probate proceedings respecting his estate.

> "If this excuse could prevail it would unsettle all proceedings *in rem*. . . . Those who claim an interest in persons or things must be charged with

> knowledge of their status and condition and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*" (Id. 32, 3).

And the question of the efficacy of any such proceeding as affecting the assertion of the claim of any one can not be made to depend upon his proximity to, or remoteness from, the seat of the court having jurisdiction in the premises: There is no such quality in distance from the location of that court or its records as may differentiate in respect of diligence those living within, and those living without, the jurisdiction (Id. 130, 1).

4. And the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches is a favored doctrine of equity and, as has been said by this court, has by itself been expressed in so many cases as to render the doctrine elementary.

> Penn. Mut. Life Ins. Co. *vs.* Austin, 168 U. S., 685, 697.

In this case the reason upon which the rule is based is so well stated and illustrated as to make reference to any other authority superfluous. The adjudicated cases, as therein said (quoting from the preceding case of Galliher *vs.* Cadwell, 145 U. S., 368, 372), "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition of relations during this period of delay it would be an injustice to the latter to permit him now to assert them."

In the case at bar, in addition to other obvious considerations, it clearly appears that the testator's estate was settled upon the assumption, concurred in by complainant's privy in estate, that the testator's will was lawful and valid; that complainant, years prior to the institution of the proceedings looking to the final distribution of the estate, had been in the jurisdiction of its *situs*, and had there made inquiry having for its object the enlightenment of the question whether there survived his privy in estate such an interest in the testator's estate as to give him any claim thereto; that, in reliance upon his non-assertion and consequent abandonment of any possible claim in the premises, all other parties in interest had procured a distribution of the estate, involving the composing of possible controversies in relation thereto and the adjustment of large claims in the way of commissions and indebtedness of the estate; that such other parties thereupon entered into possession of their respective distributive portions, and adapted themselves and their affairs to the possession and enjoyment of the same, as though such possession and enjoyment and their right thereto were forever removed beyond the domains of either doubt or controversy; and that death has long since sealed the lips of the only person upon whose alleged statement complainant now relies for the claim that he was lulled into security, and thereby induced to the inaction, from the consequences of which he now prays belated relief; which belated relief, be it observed, has for its sole object the privilege of raising at this late day the question of the validity of the testator's will: a question facing the complainant at the moment of his inquiry in 1893 as to his wife's interest in her father's estate, and, if ever fairly existing, long since become negligible, first, through the action of complainant's privy in estate, and, afterwards, through his own inaction.

5. And the mere reminder of the nature of complainant's supineness and of the extent of his gross neglect of whatever interest he may ever have had in the premises of itself suffices to show that no case could more clearly call for application of the doctrine of laches in its fullest rigor.

Not only is complainant presumed to have been acquainted with the law of the jurisdiction by whose grace only he could ever have asserted a claim to an interest in the testator's estate, and conclusively presumed to have known whatever could have been discovered had he made such use of his knowledge as any person of fair intelligence would have made of it (Main Brief, p. 148), but, also, he, in fact knew that his privy in estate, through whom he now claims, had that in respect of which he claims through her father's will, which had been probated, had become a matter of public record, was easily accessible to him and open to his examination, and from the simplest inquiry concerning which he would, by the exercise of the most ordinary diligence, have seasonably discovered whatever right he might, at any time, have had in respect of the claim now set up by him (Id. 150, 1). It appearing that the means were at hand for him readily to discover and assert his rights, he must be held to have had notice and knowledge of everything which would have been disclosed by a proper use of such means by a person of ordinary care and prudence in the transaction of his own business; and this is to say that he must be held to have had notice and knowledge of everything pertaining to the estate of his wife's father, including the terms of his will, the probate thereof, the conduct of the beneficiaries thereunder and in relation thereto, and every step in the course of administration of the estate; and, were this not so, upon principles everywhere generally recognized, he can not be heard to say that he has not, at all times, known the

clear and precise provision of the statute law of the State within whose territorial limits, and subject to whose jurisdiction, the testator's estate has exclusively been, namely:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry he might have learned such fact."
>
> Code Civ. Proc., sec. 19.

6. The complainant, if entitled as he claims, has a plain, adequate, and complete remedy at law.

He was not party to the proceedings by which, as he claims, he was apparently deprived of the right which he is asserting, and, if so, he was clearly not bound by such proceedings, and they can not be interposed as an obstacle to any suit at law which he might bring. The case of Roller *vs.* Holly, 176 U. S., 398, on which he relies for the constitutional protection which he claims to have been denied him, is directly in point; and so are all the adjudications, and so is the matter in principle.

It is not conceived upon what possible ground his right to a remedy at law, upon the hypothesis of his own making, could be denied, or the jurisdiction of equity properly invoked.

7 Passing the question whether the court below had, upon any ground, jurisdiction of the subject-matter of the suit, and leaving consideration of that question to what is said in relation thereto in the main brief, the want of jurisdiction of this court of the cause would seem manifest.

The only allegations in the bill which, by any possibility, can be thought to point to any one of the six

classes of cases in which, under the act of 1891, appeal may be had directly from a circuit court of the United States to this court, point to the class involving the construction or application of the Constitution of the United States; and the only allegations in the bill (ante. pp. 10–11), which can, by any possibility, be thought to bring the case within that class are, in effect, one allegation, namely, that the period of ten days fixed by notice of the proceedings on the petitions for final distribution and settlement of the executor's account was insufficient to enable the complainant, who resided in New York, to have, by any possibility, obtained knowledge of the notice and to have prepared for the hearing of the proceedings; wherefore the notice and proceedings did not constitute due process of law within the meaning of section 1, of Article XIV, of the Constitution.

This court has laid down, in unmistakable terms, the rule by which to test the sufficiency of an allegation supposed to show the existence in a given cause of an essential jurisdictional question.

> "The words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent."
>
> Penn. Mut. Life Ins. Co. *vs.* Austin, 168, U. S., 685, 695.

> "It is settled that the mere averment of a constitutional question is not sufficient, where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. Fayerweather *vs.* Ritch, 195 U. S., 276, 299. We think that the alleged violations of Federal right based upon the

14th Amendment were so unsubstantial and devoid of merit that they furnish no real support to the contention that the decree of the Circuit Court of Appeals was not final. From this it follows that the motion to dismiss must prevail."

Farrell *vs.* O'Brien, 199 U. S., 89, 100, 101.

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution had been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the law. In Hamblin *vs.* Western Land Company, 147 U. S., 531, it was stated that 'a real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of State courts. Millanger *vs.* Hartupee, 73 U. S., 258; New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 87. In the latter case, it was said that the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such avement, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

Wilson *vs.* N. C., 169 U. S., 586, 595.

The allegation of the pretended invasion or disregard of complainant's constitutional rights, tested by these adjudications and the principle which they declare, is plainly "bare assertion," "frivolous," not "real and colorable," "without any support whatever in reason;" "unsubstantial and devoid of merit," "fictitious and fraudulent," and without the "least color of ground:" and, accordingly, the pretended constitutional question "does not really exist."

The allegation, in its essence, as in its extent, is only that the ten days' notice prescribed by the law of California as an incident of the procedure prescribed by that law in respect of the administration of the estate of a decedent (the right to share in which, by any one, is mere matter of grace and must be accepted with the conditions attached to the extension of that grace), while sufficient to bind citizens and residents of the State, to whom its grace is presumably more readily extended than to non-citizens and non-residents, is yet not sufficient for the latter, and that the mere fact of residence without the State entitles such latter to a consideration denied to the State's own residents and citizens; with this additional infirmity, that the location of the place of complainant's residence as being by implication, and implication only, at such a distance from the State, as to deny sufficiency of time to the complainant, is conspicuously without merit, seeing not only that no reason for such alleged insufficiency is indicated, but also that it is within the judicial knowledge of the court (and, by reason of its constitution and the allotment of the duties of its members, within its personal knowledge), that the means and facilities of communication between the place of the proceedings and that of complainant's residence render the allegation bald, almost to the extent of offense against intelligence.

Such cases as that of Roller *vs.* Holly, *supra*, have no application in the premises. That case was tersely, yet effectively, distinguished by the court below (Rec., pp. 88–9, fols. 166–7); and, being a case *inter partes* and *in personam*, it distinguishes itself from all cases *in rem* and *quasi in rem*, and *a fortiori* from cases involving the devolution of the estates of decedents and the administration of such estates. If it be, as the fact is, that the devolution of such estates and

their administration is matter peculiary appertaining to the sovereignty of the State, and within the exclusive control of its legislature, it is difficult, and indeed impossible. to discover room for question as to the sufficiency of anv proceeding which the State may see fit to prescribe in the premises, even though such proceeding involve notice not deemed by all sufficient. In such a matter, every legislature is, by reason of the very nature of the thing, a law unto itself, and to recognize any other principle would be for the courts to arrogate to themselves the privilege and power to prescribe to the several States a material condition upon which they may exercise their unquestionably sovereign power, savoring of grace, in respect of the devolution of the estates of their own citizens lying within their own territorial borders.

Respectfully submitted.

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